UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

SENTIUS INTERNATIONAL, LLC,	)	C-13-00825 PSG
	)	
PLAINTIFF,	)	SAN JOSE, CALIFORNIA
	)	
VS.	)	JANUARY 13, 2015
	)	
MICROSOFT CORPORATION,	)	PAGES 1-194
	)	
DEFENDANT.	)	
	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE PAUL S. GREWAL
UNITED STATES MAGISTRATE JUDGE

A P P E A R A N C E S:

FOR THE PLAINTIFF:

SUSMAN GODFREY
BY: MAX L. TRIBBLE, JR.
VINEET BHATIA
1000 LOUISIANA, SUITE 5100
HOUSTON, TEXAS 77002

BY: SETH ARD
560 LEXINGTON AVENUE, 15TH FLOOR
NEW YORK, NEW YORK 10022

BY: KRYSTA KAUBLE PACHMAN
MENG XI
1901 AVENUE OF THE STARS, SUITE 950
LOS ANGELES, CALIFORNIA 90067

APPEARANCES CONTINUED ON NEXT PAGE

OFFICIAL COURT REPORTER: LEE-ANNE SHORTRIDGE, CSR, CRR
CERTIFICATE NUMBER 9595

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY
TRANSCRIPT PRODUCED WITH COMPUTER

APPEARANCES (CONTINUED)

FOR THE PLAINTIFF: SETH LAW OFFICES
BY: SANDEEP SETH
1200 SMITH STREET, SUITE 1600
HOUSTON, TEXAS 77002

ALSO PRESENT: MARC BOOKMAN

FOR THE DEFENDANT: FISH & RICHARDSON
BY: JONATHAN J. LAMBERSON
500 ARGUELLO STREET, SUITE 500
REDWOOD CITY, CALIFORNIA 94063

BY: KURT L. GLITZENSTEIN
ONE MARINA PARK DRIVE
BOSTON, MASSACHUSETTS 02210

ALSO PRESENT: ISABELLA FU

SAN JOSE, CALIFORNIA JANUARY 13, 2015

P R O C E E D I N G S

(COURT CONVENED AT 11:53 A.M.)

THE COURT: MR. RIVERA, WOULD YOU CALL THE LAST MATTER ON THE CALENDAR?

THE CLERK: CALLING SENTIUS INTERNATIONAL, LLC, VERSUS MICROSOFT CORPORATION, CASE NUMBER CV-13-825 PSG.

COUNSEL, PLEASE STATE YOUR APPEARANCES.

MR. TRIBBLE: YOUR HONOR, I HAVE SIX MINUTES WHERE I CAN STILL SAY GOOD MORNING.

MAX TRIBBLE FOR THE PLAINTIFF, SENTIUS.

AND WITH ME TODAY I HAVE MY PARTNERS, VINEET BHATIA, KRYSTA KAUBLE, SETH ARD, AND MY CO-COUNSEL, SANDEEP SETH.

AND ALSO OF SUSMAN GODFREY IS MENG XI.

THE COURT: MR. TRIBBLE, GOOD MORNING TO YOU AND EACH OF YOUR COLLEGES.

MR. LAMBERSON.

MR. LAMBERSON: GOOD MORNING, YOUR HONOR.

JONATHAN LAMBERSON AND KURT GLITZENSTEIN FROM FISH & RICHARDSON.

AND WITH US TODAY IS ISABELLA FU FROM MICROSOFT.

THE COURT: GOOD MORNING TO EACH OF YOU. IT'S A PLEASURE TO HAVE YOU.

I APPRECIATE YOUR PATIENCE WITH MY CALENDAR TODAY. AS YOU CAN SEE, IT'S BEEN A BUSY MORNING, BUT I'M VERY EAGER TO TURN

TO THESE ISSUES, PARTICULARLY WITH A TRIAL DATE COMING UP SO QUICKLY.

AS I UNDERSTAND IT, WE HAVE A MOTION FOR SUMMARY JUDGMENT, A PAIR OF DAUBERT MOTIONS, AND A MOTION TO PHASE TRIAL.

I'M HAPPY TO TAKE MY DIRECTION FROM YOU ALL, BUT IN THE INTEREST OF MOVING THIS ALONG, PERHAPS I MIGHT SUGGEST THAT WE DEFER THE MOTION TO PHASE TRIAL AND START WITH THE SUMMARY JUDGMENT MOTION AND GO TO DAUBERTS AFTER THAT.

DOES THAT WORK FOR EVERYBODY?

MR. LAMBERSON: YES, YOUR HONOR.

MR. TRIBBLE: THAT'S FINE, YOUR HONOR.

ALSO, I SHOULD HAVE INTRODUCED OUR CLIENT, MARC BOOKMAN --

THE COURT: ALWAYS A GOOD IDEA, MR. TRIBBLE.

MR. TRIBBLE: -- THE NAMED INVENTOR, YOUR HONOR. THANK YOU.

THE COURT: IT'S A PLEASURE TO HAVE YOU AS WELL, SIR.

ALL RIGHT. WELL, STARTING WITH THE MOTION FOR SUMMARY JUDGMENT, MR. LAMBERSON, I WILL ALLOW YOU TO PROCEED. GO AHEAD.

MR. LAMBERSON: THANK YOU, YOUR HONOR.

ARE WE ON ON OUR SLIDES?

WE DO HAVE SOME SLIDES, YOUR HONOR. I HAVE COPIES IF YOU'D -- HOW MANY WOULD BE GOOD FOR THE COURT?

THE COURT: TWO SHOULD BE MORE THAN SUFFICIENT.

MR. LAMBERSON: OKAY , AND ONE FOR THE REPORTER.

MR. TRIBBLE: THANK YOU.

MR. LAMBERSON: SURE.

YOUR HONOR, IN OUR NON-INFRINGEMENT MOTION, WE HAD, AS I COUNTED THEM, BASICALLY FIVE ISSUES. THERE ARE TWO THAT WE'RE GOING TO SUBMIT ON THE PAPERS. I THINK THEY'RE RELATIVELY STRAIGHTFORWARD UNLESS, OF COURSE, YOUR HONOR HAD QUESTIONS.

DIRECT INFRINGEMENT IS SIMPLE FAILURE OF PROOF IN OUR VIEW. THEY JUST DIDN'T ASK ANYBODY THE QUESTIONS THEY SHOULD HAVE ASKED TO SHOW THAT MICROSOFT PRACTICED THE METHODS IN THE UNITED STATES, ON AN ACCUSED PRODUCT, AT THE RELEVANT TIME AND DID EVERY STEP IN ORDER.

AND THEN ACTIONS 2010, 2013, AS I READ THE PAPERS, THERE'S NO DISPUTE, NO OPPOSITION TO THAT MOTION.

I DID WANT TO ADDRESS TODAY WHAT I THINK OF AS THE PRIMARY ISSUE, THE NO LINKING ISSUE; I'LL ALSO BRIEFLY TOUCH ON THE INDUCEMENT PIECE, THE PRE-SUIT, BASICALLY PRE-SUIT INDIRECT INFRINGEMENT; AND THEN VERY, EVEN LESS BRIEFLY, MORE BRIEFLY ON NO WILLFULNESS.

SO STARTING WITH LINKING. AND, YOUR HONOR, I KNOW IT'S BEEN SOME AMOUNT OF TIME SINCE WE WERE HERE ARGUING CLAIM CONSTRUCTION. JUST TO CAST OUR MINDS BACK, YOU'LL RECALL THAT THESE PARTICULAR PATENTS TALK ABOUT SPECIFIC METHODS FOR LINKING USING A LOOK-UP TABLE, AND WHAT I'VE SHOWN HERE -- MOST OF THIS IS FROM THE PATENT. THIS IS FIGURE 2, THIS IS FIGURE 3 FROM THE PATENT, FIGURE 2 ON THE TOP LEFT, FIGURE 3 ON THE

BOTTOM RIGHT. WE'VE INCLUDED AN EXCERPT FROM THE PATENT THAT DESCRIBES THIS.

AND I GUESS I SHOULD STEP BACK AGAIN. JUST TO REORIENT THE COURT, AT THIS POINT IN THE CASE, THERE'S ONLY TWO PATENTS LEFT. YOU MAY RECALL WHEN WE STARTED THE CASE, THERE WERE FOUR, WENT DOWN TO THREE, NOW WE'RE DOWN TO TWO. IT'S ONLY THE RE-ISSUE PATENTS, THE LOOK-UP TABLE PATENTS. AND BOTH RE-ISSUE PATENTS HAVE THE EXACT SAME DISCLOSURE, WRITTEN DESCRIPTION, AND THE CLAIMS ARE VERY, VERY SIMILAR. SO THERE'S REALLY NO UNIQUE ISSUES TO EITHER PATENT.

ALL RIGHT. SO IN THE LOOK-UP TABLE PATENTS, WHAT WE'RE SHOWING HERE IS THE LINKING THAT IS SHOWN IN THE PATENT. YOU HAVE THIS TABLE WITH A LINK COLUMN. YOU HAVE A NUMBER THAT IS GOING TO TAKE YOU WHERE YOU GO TO DO YOUR LOOK UP, AND IT'S GOING TO THEN POPULATE ON THE SCREEN WHAT YOU LOOKED UP.

SO IN THIS CASE WE HAD THE TRANSLATION JAPANESE ECONOMY, HAD OUR POINTER 200, IT TAKES US TO ANOTHER TABLE WHICH HAS THE DATA THAT WE'RE LOOKING FOR, AND THAT SHOWS IN THE POP-UP.

AND IT'S REALLY AS SIMPLE AS THAT. IT'S NOT A TERRIBLY COMPLICATED PATENT.

WE TALKED TO MR. YAMANAKA, WHO'S ONE OF THE NAMED INVENTORS, AND WE ASKED HIM ABOUT THIS PART OF THE DISCLOSURE.

WHAT'S SHOWN IN THE LINK COLUMN?

THAT'S BASICALLY A POINTER OR A REFERENCE TO AN OBJECT.

YOU'LL RECALL WE HAD THIS DISCUSSION ABOUT POINTER OR

REFERENCE, BUT HE TREATED THE TWO TERMS SYNONYMOUSLY.

AND WHAT DO YOU MEAN BY THAT? WHAT'S THE PURPOSE OF THE LINK?

BASED ON MY RECOLLECTION, IT IS TO SHOW YOU BASICALLY IT HAS THE TYPE OF DATA, AS WELL AS THE LOCATION.

AND THE LOCATION IS THE NUMBER?

YES, BASICALLY.

AND JUST TO CLEAR UP ONE THING RIGHT OFF THE BAT, THERE'S BEEN A LOT OF DISCUSSION IN THE PLEADINGS ABOUT DIRECT POINTERS VERSUS INDIRECT POINTERS.

THE COURT: IS THAT A DISTINCTION THAT MATTERS IN YOUR VIEW?

MR. LAMBERSON: IT DOES NOT, AND I'LL SHOW YOU THE CLAIM CONSTRUCTION TRANSCRIPT IN A MINUTE WHERE WE HAD EXACTLY THIS DISCUSSION.

THE COURT: I VAGUELY RECALL IT MYSELF, SO I APPRECIATE THE REFRESHER.

GO AHEAD.

MR. LAMBERSON: RIGHT. IT DOESN'T MATTER, YOUR HONOR, AND HERE'S WHY.

SO WHAT WE'VE SHOWN HERE, THE JAPANESE ECONOMY EXAMPLE IN OUR TABLE -- AND THIS IS A DEMONSTRATIVE, THIS TABLE HERE IS A DEMONSTRATIVE THAT WE'VE CREATED -- BUT WHAT WE'RE SHOWING HERE WOULD BE A DIRECT POINTER WHERE YOUR NUMBER 200 DIRECTLY POINTS YOU TO THE DATA. SO THIS IS A POINTER TO DATA.

YOUR EXAMPLE 100 WOULD BE AN EXAMPLE OF AN INDIRECT POINTER. SO YOU HAVE A POINTER TO THE LOCATION OF DATA.

SO IN THIS CASE, THE PICTURE ITSELF IS NOT IN THE TABLE, BUT THE POINTER, OR LINK, TO THE PICTURE, WHICH IS THE FILE PATH THAT TELLS YOU WHERE TO GET IT, IS IN THE TABLE.

THE COURT: SO THE THING I COULDN'T QUITE KEEP STRAIGHT WAS THE NOTION THAT LOCATION OF DATA IS ULTIMATELY ITSELF DATA, RIGHT? I MEAN, EITHER WAY WE'RE TALKING ABOUT SOME BIT AND SOME REGIONAL DATABASE; RIGHT?

MR. LAMBERSON: WELL, IT'S ALL BITS, YES.

BUT IT HAS TO BE A -- AS THE COURT SAID, A POINTER -- YOU CAN HAVE A POINTER TO DATA, WHICH IS OUR DIRECT POINTER, OR A POINTER TO LOCATION OF DATA.

SO A LOCATION IS A SPECIFIC WORD. IT HAS TO TELL YOU WHERE SOMETHING IS, AND THAT'S SORT OF THE KEY POINT HERE AND WHAT WE'LL GET TO IN A MINUTE IS THE BIT -- THE BIT FLAG THAT WE'RE TALKING ABOUT IS NOT A POINTER TO DATA OR A POINTER TO THE LOCATION OF DATA.

AND AS I MENTIONED, I PUT UP A PORTION OF THE CLAIM CONSTRUCTION HEARING TRANSCRIPT ON OUR NEXT TWO SLIDES, 7 AND 8, WHERE WE TALKED ABOUT THIS, AND WHAT I WAS TALKING -- AND WE ACTUALLY WALKED YOUR HONOR THROUGH AT THAT TIME A LITTLE BIT ABOUT HOW THE PRODUCTS WORKED. NONE OF THAT HAS CHANGED. IT'S ALL THE SAME.

AND I'LL ACKNOWLEDGE VERY FRANKLY, WE THOUGHT THIS

CONSTRUCTION WAS DISPOSITIVE AND WE WERE BASICALLY DONE, BUT HERE WE ARE.

SO OUR DISCUSSION WAS, "YOU CAN'T GET TO A POINT WHERE IT SAYS," THIS IS MYSELF, "'IT'S OUT THERE SOMEWHERE. GO LOOK HARDER. HOPEFULLY YOU'LL FIND IT.' THAT'S NOT A LINK. THE DISPUTE IS NOT DIRECT/INDIRECT. THAT HAS NEVER BEEN THE DISPUTE."

AND YOUR HONOR SAID -- YOUR HONOR MAY RECALL, YOU WERE ASKING WHETHER "CONNECTION" WAS THE RIGHT WORD FOR THE CONSTRUCTION.

YOUR HONOR SAID, "YOU'RE SAYING IT WOULD BE A CONNECTION, IN YOUR EXAMPLE."

"IF IT WERE JUST OUT THERE?"

AND YOUR RESPONSE WAS, "WELL, NO. I TEND TO AGREE WITH YOU THERE THAT THE FACT THAT, 'HEY, GO LOOK IN THE LIBRARY, IT'S SOMEWHERE,' THAT'S NOT SUFFICIENT."

AND SO THE DISCUSSION WE WERE HAVING WAS, DO YOU NEED TO HAVE A DIRECT CONNECTION TO IT, OR IS A POINTER GOOD ENOUGH?

AND WHAT WE'LL SEE IS THE MICROSOFT PRODUCTS HAVE NEITHER. THEY HAVE TO DO A SEARCH EVERY TIME FOR WHAT THOSE CORRECTIONS ARE.

IN ANY EVENT, WE HAD THIS DISCUSSION THAT, AS I'M SITTING HERE RIGHT NOW, IT SEEMS TO ME IF YOU WANT THAT INDIRECT EXAMPLE, CONNECTION WOULDN'T -- SO YOUR HONOR WAS ASKING, IS "CONNECTION" THE RIGHT WORD?

AND WE WENT ON AND I SAID, I AGREE WITH YOUR HONOR THAT IN THE SENSE THAT IF YOU'RE SAYING THERE HAS TO BE SOMETHING HERE THAT IS DIRECTLY CONNECTED TO SOMETHING, OR INDIRECTLY CONNECTED, THAT "CONNECTION" WOULD BE FINE. "ASSOCIATION" IS TOO LOOSE.

SENTIUS, AS YOU'LL RECALL, WAS ARGUING FOR A MORE GENERAL ASSOCIATION OF THE TWO THINGS, THAT ONE IS RELATED TO THE OTHER.

OUR ARGUMENT WAS THAT'S NOT SUFFICIENT. AND WE THOUGHT "CONNECTION" WAS NOT THE RIGHT WORD ONLY BECAUSE WE WANTED TO CAPTURE THIS IDEA OF EITHER A DIRECT OR INDIRECT LINKAGE.

BUT CERTAINLY YOU DO HAVE TO HAVE A LINK, AND IF YOU THINK OF THE LINKS AS LINKS OF A CHAIN OR SOMETHING GETTING YOU -- YOU HAVE BASICALLY -- AS THE COURT SAID, IT'S A POINTER. IT'S A LOCATION INFORMATION, AND IT COULD POINT YOU DIRECTLY TO THE DATA YOU WANT, OR IT COULD POINT YOU TO IT INDIRECTLY. BUT IT HAS TO BE A POINTER. IT HAS TO GIVE YOU THAT LOCATION INFORMATION.

AND THAT'S -- THAT'S ULTIMATELY WHAT THE COURT'S, WE BELIEVE THE COURT'S CLAIM CONSTRUCTION RESOLVED.

AND JUST TO REMIND THE COURT WHAT WE DISCUSSED BACK AT CLAIM CONSTRUCTION AND TO REFRESH HOW THE PRODUCTS WORK -- AND THERE'S NO DISPUTE, BY THE WAY, AT ALL ABOUT HOW THE PRODUCTS WORK. EVERYBODY AGREES HERE.

SO WHEN YOU'RE TYPING IN WORD, WE'VE SHOWN WORD ON THE

LEFT, AS YOU TYPE EACH WORD, EVERY TIME YOU HIT SPACE BAR OR MOVE YOUR MOUSE OFF OF THE WORD, THAT WORD IS GOING TO GET SENT TO THE SPELLING ENGINE, THE CODE IS GOING TO CHECK, IS THE WORD RECOGNIZED OR NOT RECOGNIZED IN THE DICTIONARY?

THERE'S ACTUALLY A COMMAND CALLED A VERIFY COMMAND, SO YOU CALL YOUR SPELLER ENGINE THROUGH A FUNCTION CALL AND YOU SAY, PLEASE VERIFY THIS BUFFER OF TEXT. DO YOU RECOGNIZE IT OR NOT?

AND THAT'S ALL THAT GETS RETURNED, AND THAT'S ALL THAT GETS STORED IN THE TABLE WE'RE TALKING ABOUT.

SO WHAT WE SHOW IN THE BOTTOM RIGHT IS BASICALLY WHAT THE TABLE STRUCTURE IN WORD LOOKS LIKE BEHIND THE SCENES. EACH WORD IN THE DOCUMENT HAS A CHARACTER POSITION, STARTING FROM 0, AND YOU'RE GOING TO RECORD STATE FOR RANGES OF TEXT THAT HAVE THE SAME STATE. SO IT'S NOT WORD BY WORD.

THE COURT: OH, THAT'S INTERESTING. SO AS LONG AS THE STATE IS CONSTANT, THE FLAG IS CONSTANT?

MR. LAMBERSON: THAT'S RIGHT, YOUR HONOR.

THE COURT: I DIDN'T REALIZE THAT.

OKAY. GO AHEAD.

MR. LAMBERSON: SO YOU'LL SEE IN THIS EXAMPLE, FROM 0 TO 20, YOU DON'T HAVE ANY -- ALL OF THE WORDS WERE RECOGNIZED WOULD BE THE BEST WAY TO SAY IT. SO YOUR STATE IS 0 FOR THAT ENTIRE RANGE OF TEXT.

THE COURT: ALL RIGHT.

MR. LAMBERSON: AND THEN FROM 20 TO 23, YOUR STATE

WOULD BE 1, WHICH IS THAT THE TEXT CHARACTERS THERE WERE NOT RECOGNIZED.

AND THEN SO ON AND SO ON.

ALL INCORRECT -- ALL -- SO ALL REGIONS THAT WERE NOT LOCATED IN THE BACKGROUND SEARCH HAVE EXACTLY THE SAME FLAG. THE FLAG CAN ONLY BE TWO VALUES. IT'S EITHER A 0 OR A 1, AND THAT'S ALL.

AND ALL THAT FLAG VALUE IS INDICATING IS THAT AT THE TIME THAT I DID THIS LOOK TO SEE IF I RECOGNIZE IT, I DIDN'T FIND IT.

NOW, THAT COULD CHANGE, AND WE'LL WALK THROUGH HOW IT COULD CHANGE LATER. THE WORD COULD GET ADDED TO THE DICTIONARY. THE DICTIONARY COULD GET UPDATED. SO THERE ARE VARIOUS WAYS -- SO WHAT THE POTENTIAL CORRECTIONS ARE ARE NOT KNOWN. ALL WE KNOW IS AT THIS POINT IN TIME, THERE IS A WORD THAT THE BACKGROUND RECOGNIZER DID NOT RECOGNIZE.

THE COURT: THERE'S A REGION OF TEXT?

MR. LAMBERSON: IT'S A REGION OF TEXT. AND THAT IS -- AND JUST TO PUT A FINER POINT ON IT, OUR ENGINEERS HAVE TESTIFIED YOU MAY EVEN HAVE MULTIPLE ENTRIES FOR THE SAME WORD. SO YOU COULD VERY WELL HAVE A CASE WHERE -- AND THIS MAKES SENSE BECAUSE IF YOU THINK ABOUT IT, PEOPLE CAN EDIT DOCUMENTS IN AN INFINITE NUMBER OF WAYS. CHANGES ARE MADE ALL THE TIME. YOU COULD ACTUALLY FOR THIS WORD, J-M-P-S, YOU COULD HAVE A REGION FOR J-M THAT HAD A FLAG OF 1, AND THE P-S THAT HAD A

FLAG OF 1, OR VICE-VERSA. YOU COULD HAVE A RANGE THAT HAD MULTIPLE WORDS.

SO REALLY THIS IS BASED ON STATE OF A CHARACTER POSITION WOULD BE THE BEST WAY TO THINK ABOUT IT.

THE COURT: RIGHT.

MR. LAMBERSON: THAT'S WHAT THIS TABLE IS STORING.

AND YOU MAY ASK, WELL, WHY NOT DO WORDS?

WELL, IT TURNS OUT THERE'S A LOT OF THINGS IN MICROSOFT WORD THAT DO YOU BASED ON CHARACTER POSITIONS. YOU CAN ACTUALLY -- IF YOU WANTED TO, YOU COULD SPECIFY THAT ONLY THE LETTER "M" IN J-M-P-S IS SPANISH.

WHY WOULD YOU WANT TO DO THAT? I DON'T KNOW. BUT YOU CAN.

AND SO WHAT IT HAS TO KEEP TRACK OF IS EVERY CHARACTER POSITION THAT I NEED TO KNOW SOMETHING ABOUT, I NEED TO KNOW THE STATE OF MY BACKGROUND CHECK AT THAT CHARACTER POSITION.

SO WE'VE KEPT IT SIMPLE HERE SHOWING WORDS, BUT EVEN HERE YOU SEE FOR THE CORRECTLY SPELLED REGIONS, IT IS JUST A SINGLE ENTRY.

ALL RIGHT. SO AS I READ SENTIUS'S OPPOSITION, THEY'RE MAKING WHAT I THINK OF AS EFFECTIVELY THREE ARGUMENTS, THREE DIFFERENT ARGUMENTS FOR WHY THIS ERROR FLAG IS ALLEGEDLY A POINTER UNDER THE COURT'S CONSTRUCTION.

AND I WOULD JUST ASK THE COURT TO STOP THERE AND ASK, YOU KNOW, HOW CAN IT BE -- WHY DO WE NEED THREE DIFFERENT THEORIES?

SHOULDN'T IT BE RELATIVELY EASY TO SEE -- YOU KNOW, IS THIS POINTING TO SOMETHING OR NOT IS SORT OF THE FUNDAMENTAL QUESTION, AND IF SO, WHAT IS IT POINTING TO? HOW CAN IT BE THE CASE THAT IT POINTS TO THREE DIFFERENT THINGS?

BUT IN ANY EVENT, I'M GOING TO WALK THROUGH EACH OF THE THREE THEORIES AND EXPLAIN WHY WE BELIEVE THEY JUST DON'T SATISFY THE COURT'S CONSTRUCTION.

AND ONE POINT I WANT TO MAKE HERE BEFORE WE GO THROUGH THIS, YOUR HONOR WILL RECALL THAT THERE IS A SEPARATE ISSUE THAT YOUR HONOR RESOLVED IN CLAIM CONSTRUCTION, WHICH WAS THE ORDER OF THE METHOD STEPS.

THE COURT: RIGHT.

MR. LAMBERSON: AND THE ORDERING HAS TO BE DONE -- HAS TO BE DONE IN ORDER, THE STEPS.

AND IF YOUR HONOR WILL RECALL, THERE ACTUALLY -- THE LINKING LIMITATION -- I THINK I HAVE A SLIDE ON THIS LATER, BUT WE CAN PULL UP THE PATENT IF WE NEED TO -- THE LINKING LIMITATION COMES BEFORE THE SELECTION LIMITATION. IT'S BEFORE THE RIGHT CLICK IN THIS CASE.

SO EVERYTHING THAT IS LINKING HAS TO BE DONE BEFORE THE USER EVER DOES A CLICK. SO THAT MEANS IT HAS TO BE -- THIS TABLE IS ALL THEY CAN POINT TO BECAUSE THIS IS ALL THAT EXISTS PRIOR TO RIGHT CLICK.

AND AT THIS POINT, WE DON'T KNOW WHAT THE POTENTIAL CORRECTIONS ARE. NOBODY HAS CLICKED ON ANYTHING. WE HAVEN'T

LOOKED UP ANYTHING. WE HAVEN'T GONE OUT TO ASK, WHAT ARE THE POTENTIAL CORRECTIONS?

SO THE QUESTION REALLY IS, IS THIS FLAG THAT IS SET BEFORE WE DO ANYTHING, BEFORE ANYBODY CLICKS ON ANYTHING, IS THIS A POINTER TO ANYTHING? ANYTHING AT ALL?

AND THE ANSWER IS NO.

SO LET'S WALK THROUGH THE VARIOUS THEORIES. IT'S UNCLEAR TO ME WHETHER THIS IS A -- THE FIRST THEORY I'LL SAY THAT I READ IS THAT THE FLAG IS A POINTER TO POSSIBLE CORRECTIONS BECAUSE EVERY TIME I RIGHT CLICK, I GET THE SAME POSSIBLE CORRECTION SO THERE MUST BE SOME, SOME LINK THERE.

AND THAT'S JUST -- IT'S UNCLEAR TO ME WHETHER THIS IS THEIR THEORY OR NOT, BECAUSE WHEN THEY GET TO, YOU KNOW, HERE ARE OUR THREE THEORIES OF THE CASE, THIS WASN'T ONE OF THEM, BUT THEY DO FEATURE IT IN THE BRIEF SO I WANTED TO RESPOND TO IT.

AND THE KEY POINT HERE IS BEFORE THE RIGHT CLICK, WORD HAS DONE NOTHING TO LOOK UP WHAT THE POTENTIAL CORRECTIONS ARE, OR WHETHER THEY EVEN EXIST. SO YOU CAN HAVE A STRING OF TEXT THAT IS UNINTELLIGIBLE, JUST OF RANDOM CHARACTERS.

THE COURT: GIBBERISH.

MR. LAMBERSON: GIBBERISH.

THE COURT: AND WHAT YOU'RE SAYING IS YOU'LL HAVE THE RED SQUIGGLY LINE UNDERNEATH IT, BUT IF YOU WERE TO GO AND RIGHT CLICK IT, NO CORRECTION WOULD COME UP?

MR. LAMBERSON: THAT'S RIGHT.

AND SO HOW COULD YOU POSSIBLY -- I MEAN, WHAT WOULD THE FLAG BE LINKING TO IN THAT SCENARIO? THERE ARE NO POSSIBLE CORRECTIONS, SO HOW CAN IT BE THAT YOU ARE LINKING TO THAT?

EVEN FOR WORDS WHERE THERE ARE POSSIBLE CORRECTIONS, HOW CAN WE POSSIBLY SAY THAT AN ERROR FLAG -- THAT THE SAME ERROR FLAG FOR THESE TWO VERY DIFFERENT CORRECTIONS THAT ARE GOING TO RESULT IN TWO VERY DIFFERENT SETS OF -- SORRY -- VERY DIFFERENT SETS OF POSSIBLE CORRECTIONS FOR THESE TWO DIFFERENT WORDS, IT'S THE SAME ERROR FLAG VALUE.

SO THIS FLAG VALUE, YOU CAN'T SAY IT'S POINTING TO THE SPECIFIC CORRECTIONS FOR J-M-P-S BECAUSE WHEN YOU THEN GO RIGHT CLICK, THE SAME FLAG VALUE IS GOING TO END UP AT A VERY DIFFERENT SET OF POSSIBLE CORRECTIONS FOR L-A-Z-X.

SO IT'S NOT GIVING YOU THAT POINTER TO EITHER THE DATA -- SO IN THIS CASE WE'RE TALKING ABOUT REALLY A POINTER TO DATA, DIRECT OR INDIRECT, AND THE DATA WOULD BE THE CORRECT SPELLING.

AND THE FLAG VALUE, IT JUST DOESN'T GIVE YOU THAT LOCATION INFORMATION, AND WE KNOW THAT BECAUSE WHEN YOU RIGHT CLICK, YOU COULD END UP WITH ANY OF AN INFINITE VARIETY OF POSSIBLE CORRECTIONS, SO IT'S NOT POINTING YOU WHICH WAY TO GO.

IT'S JUST -- IT'S ESSENTIALLY SAYING, IF I WERE TO WRITE A WORD -- I MAY HAVE USED THIS EXAMPLE AT THE CLAIM CONSTRUCTION. IF I WERE TO WRITE A WORD ON A PIECE OF PAPER, HAND IT TO YOUR HONOR AND SAY "THIS WORD IS MISSPELLED," NOW, I HAVEN'T TOLD

YOU WHAT TO DO WITH IT. I'VE TOLD YOUR HONOR THE STATE OF THE WORD AT THIS GIVEN TIME.

YOUR HONOR MAY KNOW, "I HAVE A DICTIONARY IN CHAMBERS, I'LL GO LOOK IT UP."

THAT'S UP TO YOU. THAT'S FINE. I DIDN'T TELL YOU TO DO IT. I DIDN'T GIVE YOU THE LINK TO IT.

THE TABLE IS NO DIFFERENT. IT'S JUST A PIECE OF STATE INFORMATION.

AND IT DOESN'T MATTER THAT SENTIUS MAKES THIS POINT, WELL, YOU ALWAYS GET THE SAME CORRECTIONS.

WELL, EVERY TIME YOUR HONOR GOES TO CHECK YOUR DICTIONARY IN CHAMBERS, YOU'RE GOING TO FIND THE SAME THING THERE UNLESS YOU BUY A NEW DICTIONARY.

NO DIFFERENT HERE. AS LONG AS YOUR DICTIONARY DOESN'T CHANGE, OF COURSE YOU GET THE SAME RESULTS. THAT DOESN'T MAKE IT A LINK. THAT DOESN'T MAKE IT A POINTER.

SO WE DON'T BELIEVE IT'S A POINTER TO THE CORRECTIONS.

ANOTHER MINOR POINT HERE. YOU COULD ADD WORDS TO THE DICTIONARY. THE DICTIONARY COULD GET UPDATED. ALL OF THESE -- YOU KNOW, WHAT YOU'RE GOING TO SHOW ULTIMATELY IS THE RESULT OF A SEARCH. WHAT WORD DOES IS IT -- SO WE TALKED ABOUT THE VERIFY COMMAND. WHAT IT'S GOING TO DO AFTER YOU RIGHT CLICK IS IT'S GOING TO DOUBLE-CHECK, IT'S GOING TO BASICALLY -- SO FIRST OF ALL, IT'S GOING TO DO THREE THINGS. AFTER YOU RIGHT CLICK ON THE WORD, IT'S GOING TO SAY, IS THIS REGION MARKED AS

CORRECT? IS THE FLAG A 0? IF SO, I'M NOT GOING TO WORRY ABOUT IT ANYMORE. WE'LL JUST LET IT GO. DON'T WORRY ABOUT IT.

THE COURT: I DON'T UNDERSTAND THAT STEP, BECAUSE IT SEEMS TO ME THAT IN ORDER FOR THERE TO BE A RED SQUIGGLY LINE, THE STATE ALREADY HAS TO BE SET AT 1, SO WHY DOES IT GO BACK AND REPEAT -- WHAT'S THE PURPOSE OF THAT REPEAT CHECK?

MR. LAMBERSON: SO THE ONLY -- SO THERE'S -- THERE'S ACTUALLY TWO REPEAT CHECKS THAT I'M GOING TO TALK ABOUT. SO WE'RE TALKING ABOUT -- THE FIRST CHECK WE'RE TALKING ABOUT NOW IS JUST LOOKING AT THE TABLE TO SEE IF THE FLAG IS A 0 OR A 1, SO THAT'S WHAT I'M GOING TO REFER TO AS THIS FIRST CHECK.

AND, YOUR HONOR, IF YOUR QUESTION IS WHY DOES IT DO THAT, THE REASON -- SO IT DOESN'T HAVE TO IS ANSWER NUMBER 1; AND IN FACT YOU'LL HEAR, POTENTIALLY LATER, WE ACTUALLY TRIED IT OUT, COULD WE JUST NOT LOOK AT THE TABLE ANYMORE? AND THE ANSWER IS, YEAH, SURE, IT WORKS FINE. SO WE DON'T HAVE TO DO IT.

WHY MIGHT YOU WANT TO DO IT? IF YOU RIGHT CLICK ON A WORD THAT IS NOT RED SQUIGGLED --

THE COURT: OKAY.

MR. LAMBERSON: -- THE FLAG IS A 0. SO IN THAT CASE, YOU WOULD SAY, "OKAY, I DON'T NEED TO BOTHER DOING THE SECOND CHECK. I CAN STOP HERE."

BUT THE SECOND CHECK THAT I WAS GETTING TO IS JUST ANOTHER REDUNDANT CALL TO THE SPELL CHECKER WITH THAT VERIFY COMMAND. SO BASICALLY ALL YOU'RE DOING IS THEN -- YOU THEN HAVE YOUR

VERIFY COMMAND, SO YOU COULD JUST SKIP LOOKING AT THE TABLE AND GO RIGHT TO YOUR VERIFY CHECK. THAT WOULD BE FINE. IT WOULD COST YOU A COUPLE CYCLES TO GO TO YOUR SPELL CHECKER, BUT AS YOU'RE TYPING A WORD DOCUMENT, YOU'RE CALLING THE SPELL CHECKER EVERY TIME YOU HIT THE SPACE BAR SO IT'S NOT LIKE THAT'S A PROBLEM FOR ANYBODY.

THE COURT: I TAKE IT YOUR MORE FUNDAMENTAL POINT IS REGARDLESS OF THE EFFICIENCY OF THE DESIGN CHOICE, THERE'S NO DISPUTE HERE AS TO HOW THIS WORKS IN SEQUENCE, RIGHT?

MR. LAMBERSON: THAT'S RIGHT. THE PROGRAM -- DOES THE PROGRAM CHECK THE STATE BEFORE DOUBLE-CHECKING THE WORD? YES, IT DOES. IT LOOKS AT THE FLAG. THERE'S NO DISPUTE IT LOOKS AT THE FLAG.

DOES THAT MEAN THE FLAG IS A POINTER TO ANYTHING? NO, IT DOES NOT. I MEAN, THAT'S THE FUNDAMENTAL DISPUTE.

AND YOUR HONOR'S CLAIM CONSTRUCTION WAS NOT THAT THE LINK IS ANYTHING USED IN ANY WAY IN THE PROCESS OF GETTING FROM, YOU KNOW, GETTING A POSSIBLE CORRECTION.

THE COURT: IT'S GOT TO BE A POINTER.

MR. LAMBERSON: IT'S GOT TO BE A POINTER. IT'S GOT TO BE A POINTER. AND IT CAN BE INDIRECT IF YOU WANT IT TO, BUT IT'S GOT TO POINT TO SOMETHING.

AND, IN FACT, I'LL SKIP AHEAD A LITTLE BIT. THIS IS EXACTLY WHAT THE INVENTORS, WHEN WE ASKED THEM, WHY DO YOU HAVE THIS LOOK-UP TABLE? WHY ARE YOU DOING THIS APPROACH? WHY DID

YOU PATENT THIS?

AND THEIR ANSWER WAS -- AND SO I ASKED HIM A HYPOTHETICAL. I SAID, LET'S SAY -- LET'S SAY YOU WERE DOING JAPANESE LANGUAGE TRANSLATION, WHICH IS WHAT'S DESCRIBED IN THE PATENT, YOU WANTED TO LOOK SOMETHING UP, AND RATHER THAN USING YOUR LOOK-UP TABLE, YOU DID A SEARCH EACH TIME. YOU WENT THROUGH THE DICTIONARY AND YOU FOUND THE TRANSLATION EACH TIME.

AND I ASKED HIM, IS THAT THE SAME OR DIFFERENT FROM WHAT YOU INVENTED?

AND HE SAID, AS STATED, THAT'S A DIFFERENT IMPLEMENTATION. SO DIFFERENT FROM THIS.

AND I ASKED HIM, WELL, WHY DO YOU SAY THAT?

WELL, THE PROCESS IS DIFFERENT. TO ME, IT'S LESS EFFICIENT, BUT YOU'RE BASICALLY HAVING TO SEARCH FOR SOMETHING EACH TIME.

BECAUSE YOU DON'T HAVE THE BENEFIT OF THE LOOK-UP TABLE?

CORRECT.

SO THE VERY POINT -- I MEAN, IT'S SORT OF INTERESTING. YOU MAY ASK YOURSELF, WHY EVEN HAVE THIS LOOK-UP TABLE AT ALL? WHY HAVE THESE LINKS IF ALL THEY'RE DOING IS TELLING YOU, OKAY, YOU HAVE TO GO DO A SEARCH? RIGHT? I MEAN, THAT'S --

THE COURT: IN FACT, I DID ASK MYSELF THAT LAST NIGHT. SO WHAT'S THE ANSWER?

MR. LAMBERSON: I DON'T HAVE ONE. YOU'LL HAVE TO DIRECT THAT TO SENTIUS. I DON'T SEE AN ANSWER TO THAT.

THE COURT: DID MR. YAMANAKA SPEAK TO THAT PARTICULAR ISSUE?

MR. LAMBERSON: TO THE ISSUE OF?

THE COURT: WHY BOTHER HAVING THE LOOK-UP TABLE?

MR. LAMBERSON: OH. WELL, NO. SO THE LOOK-UP TABLE, IT'S BASICALLY TWO DIFFERENT WAYS YOU CAN APPROACH IT.

SO IT DOESN'T MAKE SENSE, IN SPELL CHECK, TO USE THE CLAIMED LOOK-UP TABLE BECAUSE PEOPLE TYPE IN TEXT ALL THE TIME, THE WORDS CHANGE ALL THE TIME, WHAT THE POSSIBLE CORRECTIONS ARE MAY CHANGE.

OR THE PERSON MAY NEVER RIGHT CLICK ON THE WORD. SO THE WORD "SENTIUS" IS A GOOD EXAMPLE. IT ALWAYS GETS RED SQUIGGLED WHENEVER I TYPE IT IN MY BRIEFS. I NEVER CLICK ON IT BECAUSE I KNOW IT'S CORRECT. I DON'T NEED A POINTER TO A POSSIBLE CORRECTION BECAUSE IT MAY NOT BE INCORRECT.

WHEN YOU'RE DOING JAPANESE TRANSLATION, THAT'S VERY DIFFERENT BECAUSE THERE IT'S BASICALLY A TO B AND YOU KNOW THAT FOR ANY GIVEN WORD, THERE'S THIS SET OF TRANSLATIONS AND THAT NEVER CHANGES.

SO IN THAT CONTEXT, A LOOK-UP TABLE CAN BE MORE EFFICIENT BECAUSE IT CAN TELL YOU, OKAY, FOR THIS WORD, HERE IS THE SPECIFIC TRANSLATION YOU WANT, JAPANESE ECONOMY, AND THAT DOES AVOID THE SEARCH.

AND SO THE EFFICIENCY, SO IT'S BASICALLY -- WE'RE NOT SAYING NOBODY EVER NEEDS A LOOK-UP TABLE. THERE ARE

IMPLEMENTATIONS WHERE A LOOK-UP TABLE IS ADVANTAGEOUS.

AND, IN FACT --

THE COURT: WHAT YOU'RE SAYING, AMONG OTHER THINGS -- THIS IS WHAT I'M HEARING, AMONG OTHER THINGS -- IS THAT TRANSLATION IS NOT SPELL CHECK.

MR. LAMBERSON: THAT'S RIGHT.

WELL, AND I'M NOT SAYING THEIR INVENTION IS LIMITED TO TRANSLATION.

FOR EXAMPLE, THE -- IT TURNS OUT THAT THE FIELDS FUNCTIONALITY -- I DON'T KNOW IF YOUR HONOR IS FAMILIAR WITH WORD -- BUT YOU CAN ACTUALLY MAP FROM -- A FIELD IN WORD CAN REPRESENT A LINK TO AN EXTERNAL FILE, SO YOU CAN LINK TO AN EXCEL FILE, YOU KNOW, A PARTICULAR CELL IN AN EXCEL DOCUMENT. THAT ACTUALLY USES A LOOK-UP TABLE. IT USES A POINTER TO THAT EXCEL FILE IN THE TABLE AND IT HAS SINCE WORD 6.0, NOT ACCUSED HERE BECAUSE THAT'S PRIOR ART.

IN ANY EVENT, EVEN IN WORD, THERE MAY BE PLACES WHERE A LOOK-UP TABLE WOULD MAKE SENSE, BUT SPELL CHECK IS JUST NOT ONE OF THEM. THAT'S SORT OF THE FUNDAMENTAL POINT.

SO WE TALKED ABOUT NOT BEING A LINK TO THE POTENTIAL CORRECTIONS.

TO BE HONEST, I DON'T THINK IT MATTERS WHAT YOU PUT -- SO SENTIUS PUTS VARIOUS THINGS -- THEY SAY IT'S A LINK TO FILL-IN-THE-BLANK, AND THEY PUT LOTS OF THINGS IN THE RIGHT-HAND COLUMN.

I DON'T THINK IT MATTERS, RESPECTFULLY, WHAT YOU PUT THERE. A FLAG IS JUST NOT LINKING OR POINTING TO ANYTHING. IT'S ONE STEP IN THE CODE, ONE PIECE OF DATA THAT IS CONSULTED.

BUT SO IS EVERY OTHER LINE OF CODE. SO IS EVERY FUNCTION CALL THAT'S MADE, AND WE WOULDN'T SAY THAT ALL OF THOSE ARE POINTERS TO ANYTHING.

BUT IN ANY EVENT, IT'S ALSO NOT A POINTER TO THE DICTIONARY, AND WE KNOW THAT BECAUSE, AGAIN, IF IT WERE POINTING TO SOMETHING, YOU WOULD EXPECT THAT IT WOULD ACTUALLY TELL YOU WHERE TO GO AT THE VERY LEAST, AND IT DOESN'T DO THAT.

AND WE KNOW THAT BECAUSE FOR ANY GIVEN WORD, YOU MAY ACTUALLY CALL DIFFERENT DICTIONARIES. SO AS I MENTIONED, YOU CAN ACTUALLY SET THE LANGUAGE OF A PIECE OF TEXT, AND THE ERROR FLAG IS GOING TO BE, ONE, WHETHER IT'S MISSPELLED IN SPANISH OR MISSPELLED IN ENGLISH. SAME FLAG VALUE.

AND YET, AFTER YOU RIGHT CLICK ON IT, IF THE STRING IS IN SPANISH, IT'S GOING TO GO CHECK A SPANISH DICTIONARY, SEARCH THE WHOLE THING, AND YOU'LL SEE A LIST OF SPANISH CORRECTIONS.

IF THE WORD IS IN ENGLISH, IT'LL GO TO THE ENGLISH DICTIONARY, SEARCH THE WHOLE THING, GET A LIST OF ENGLISH CORRECTIONS.

SO IT'S NOT TELLING YOU WHICH DICTIONARY TO GO TO.

AND BY THE WAY, WE KNOW THIS IS ALSO THE CASE BECAUSE WE KNOW THAT SPELL AND GRAMMAR CHECK BOTH USE A FLAG VALUE OF 1, AND YET BOTH END UP CALLING COMPLETELY DIFFERENT ENGINES, IF

YOU WILL, TO DO WHAT THEY NEED TO DO.

SO IT CAN'T BE THE CASE THAT IT'S THIS FLAG VALUE THAT TELLS YOU WHERE TO GO. IT HAS TO BE THAT THE PROGRAM KNOWS WHERE TO GO AND KNOWS WHAT TO DO.

AND DOES IT CONSULT THE FLAG AT SOME POINT? POTENTIALLY. IN SOME INSTANCES, YES.

BUT THAT DOESN'T -- THAT'S VERY DIFFERENT FROM SAYING, I HAVE A TABLE THAT TELLS ME WHERE TO GO. THAT'S A LOOK-UP TABLE.

THE COURT: SO, MR. LAMBERSON, IS ANOTHER WAY PERHAPS TO PUT YOUR POINT THAT IT'S ONE THING TO SAY WHETHER TO GO TO ANOTHER LOCATION. IT'S ANOTHER THING ENTIRELY TO SAY WHERE TO GO?

MR. LAMBERSON: WHERE TO GO, THAT'S EXACTLY RIGHT.

IF I TELL YOUR HONOR, "THERE'S A LOT OF GREAT INFORMATION ON THE INTERNET, YOU SHOULD CHECK IT OUT," THAT'S NOT A LINK TO ANYTHING.

IF I TELL YOUR HONOR, "GO TO CNN.COM," I JUST GAVE YOU A LINK BECAUSE I TOLD YOU THE LOCATION.

IF YOUR HONOR THEN CLICKS ON ANOTHER LINK FROM CNN.COM, MAYBE I GAVE YOU AN INDIRECT LINK TO THAT, BUT I DIDN'T -- YOU KNOW, BASICALLY SAYING "SOMETHING IS OUT THERE, YOU SHOULD GO LOOK FOR IT" IS NOT WHAT I'VE EVER SEEN TO BE THE INVENTION THAT WE'RE TALKING ABOUT IN THIS PATENT.

AND I VIEW THERE -- JUST TO FINISH THE THOUGHT HERE ON THE

DICTIONARY POINT, I VIEW THERE AS BEING BOTH FACTUAL AND LEGAL PROBLEMS WITH THIS ARGUMENT.

SO WE'VE BEEN TALKING ABOUT SORT OF THE, JUST THE FUNDAMENTAL, IS A FLAG A POINTER? AND I DON'T THINK ANY REASONABLE JUROR -- IT'S NOT A GENUINE FACT DISPUTE. NO REASONABLE JUROR COULD COME TO THE CONCLUSION THAT THAT FLAG IS POINTING YOU TO ANYTHING.

BUT THERE'S AN ADDITIONAL PROBLEM, AND IT'S A CLAIM CONSTRUCTION PROBLEM, AND THAT HAS TO DO WITH THE -- THE STRUCTURE OF THE CLAIMS, AS WE READ THEM --

THE COURT: I WAS WAITING FOR YOU TO GET TO THIS POINT.

GO AHEAD.

MR. LAMBERSON: YEAH. SO YOU HAVE A LINK, AND THE LINK HAS TO BE TO EXTERNAL REFERENCE MATERIALS. AND SO THE QUESTION IS, WHAT ARE EXTERNAL REFERENCE MATERIALS? CAN CODE -- CAN A BLOCK OF CODE, OR AN ENGINE, BE EXTERNAL REFERENCE MATERIALS?

AND WE SUBMIT THAT IT CAN'T BE BECAUSE WE KNOW THAT EXTERNAL REFERENCE MATERIAL HAS TO BE SOMETHING THAT'S DISPLAYABLE, AND THERE'S NO INSTANCE WHERE YOU EVER PUT UP THE ENTIRE, THE ENTIRE CODE, OR ANY PIECE OF CODE.

SO IF YOU WERE -- BASICALLY YOU HAVE TO LINK TO SOMETHING THAT IS SHOWN, OR AT LEAST SHOWABLE, BECAUSE THAT'S WHAT THIS CLAIM IS TALKING ABOUT WITH THE EXTERNAL REFERENCE MATERIALS.

NOW, SENTIUS'S RESPONSE IS, WELL, YOU HAVE TO LINK TO AT LEAST ONE OF THE EXTERNAL REFERENCE MATERIALS. WE'RE SAYING YOU LINK TO ALL OF THEM.

WELL, THAT'S NOT EXACTLY WHAT THEY'RE SAYING, AND I THINK IT'S SORT OF -- IT'S AN INTERESTING ARGUMENT, BUT IT'S NOT WHAT THEY'RE SAYING. THEY'RE NOT SAYING THAT THAT TABLE HAS, YOU KNOW, A HUNDRED THOUSAND POINTERS IN IT, EACH OF THEM TO ONE WORD IN THE DICTIONARY.

WHAT THEY'RE SAYING IS, WELL, IT GETS YOU TO THE DICTIONARY AND THAT'S GOOD ENOUGH.

AND I WOULD SUBMIT THAT WITH THE WAY THESE CLAIMS ARE DRAFTED, NO, IT'S NOT. I THINK OF THESE CLAIMS AS BASICALLY -- SO ANALOGIES ARE ALWAYS TRICKY, BUT ONE THOUGHT I HAD WAS THE CLAIMS REQUIRE A LINK OR A POINTER TO A SPECIFIC BRIDGE AND IT'S NOT GOOD ENOUGH TO SAY, "WELL, IN CALIFORNIA THERE'S A LOT OF BRIDGES, GO FIND ONE." NO. THE CLAIMS REQUIRE A LINK TO THAT SPECIFIC THING YOU'RE GOING TO SHOW.

AND COULD I LINK --

THE COURT: BUT DOESN'T THE -- I'M SORRY FOR INTERRUPTING YOU.

MR. LAMBERSON: NO, I'M DONE.

THE COURT: DOESN'T CLAIM 96 ITSELF, THOUGH, OFFER AN UNDERSTANDING OF EXTERNAL REFERENCE MATERIALS THAT WOULD SEEM MORE BROADER THAN A PARTICULAR CORRECTION, OR A PARTICULAR BRIDGE TO USE YOUR ANALOGY?

MR. LAMBERSON: SURE.

THE COURT: IT TALKS ABOUT COMPRISING ANY TEXTUAL, AUDIO, VIDEO, AND PICTURE INFORMATION.

MR. LAMBERSON: ABSOLUTELY. IT COULD BE ANY OF THOSE THINGS.

AT THE SAME TIME, WHAT THE CLAIMS ALSO SAY IS THAT IT HAS TO BE SOMETHING YOU CAN DISPLAY. IT CAN'T BE -- BASICALLY I WOULD SAY WHAT WAS NOT INCLUDED IN THAT LIST WAS CODE, AND THAT IS REALLY WHAT WE'RE TALKING ABOUT HERE. THE ONLY THING YOU EVER GET TO -- AND, AGAIN, WE'RE IN A WORLD WHERE YOU ASSUME THAT THE FLAG SOMEHOW POINTED YOU TO THE DICTIONARY. I DON'T ACCEPT THAT AS A PREMISE. BUT I'M SAYING, IF YOU DO, IT'S STILL NOT GOOD ENOUGH.

AND IN THAT WORLD, I WOULD SAY, IT NEEDS TO BE TO, AS YOUR HONOR SAID, A PIECE OF TEXT YOU COULD DISPLAY OR A PICTURE OR A MOVIE, AN IMAGE. IT CAN'T BE JUST TO SAY, WELL, IT GETS YOU TO THE CODE AND THEN THE CODE DOES THE REST OF THE WORK AND THAT'S GOOD ENOUGH. THAT'S JUST -- THAT IS NOT THE LINK THAT WE'RE TALKING ABOUT HERE IN THE CLAIMS.

ALL RIGHT. AND THEN THE LAST ARGUMENT, I'M NOT SURE -- I MEAN, THIS ONE I THINK IS RELATIVELY STRAIGHTFORWARD. THEY SAY THAT THE FLAG SOMEHOW IS A POINTER TO THE WORD IN THE DOCUMENT, AND I JUST DON'T UNDERSTAND THIS ARGUMENT, FRANKLY.

THE BEGINNING POSITION ADDRESS DOES TELL YOU WHERE THE WORD -- WHERE THE RANGE OF TEXT STARTS. SO IF THEY WERE TO

SAY, WELL, THIS IS A POINTER TO THE DOCUMENT, I WOULD SAY, OKAY, I CAN SEE THAT. IT POINTS YOU TO A LOCATION OF THE DOCUMENT.

THE FLAG DOESN'T DO THAT. THE FLAG IS NOT TELLING YOU WHERE TO GO IN THE DOCUMENT.

THE COURT: ISN'T IT REALLY, THOUGH, THE COMBINATION OF THE FLAG AND THE STARTING ADDRESS WHICH GIVES YOU THAT INFORMATION?

MR. LAMBERSON: WELL, SO THE STARTING POSITION ADDRESS IS WHAT GIVES YOU THE INFORMATION. IT'S NOT EVEN THE COMBINATION. IT'S THE STARTING POSITION ADDRESS. IF YOU WANT TO KNOW WHERE THE WORD IS, THAT'S WHAT YOU LOOK AT. NOTHING ELSE.

SO COULD THEY DRAW A BOX AROUND BOTH OF THEM? I THINK THEY HAVE DONE THAT.

BUT THEN THE PROBLEM IS, WELL, AREN'T YOU REALLY CONFLATING TWO LIMITATIONS THEN BY SAYING THIS IS DOING DOUBLE DUTY?

AND THE OTHER PROBLEM THEY HAVE IS ACTUALLY IT'S DOING TRIPLE DUTY BECAUSE YOU'LL SEE THERE'S NO ENDING POSITION ADDRESS. EACH ADDRESS IS THE START OF THE NEXT RANGE, SO THEY REALLY HAVE TO SAY, OKAY, WELL, THIS IS BOTH THE START, THE END, AND THE LINK. AND I DON'T THINK IT WORKS FOR THESE CLAIMS.

THE COURT: WELL, BUT THAT REALLY GETS TO THE

QUESTION I WAS TRYING TO ASK, ANYWAY, WHICH WAS IT SEEMS THAT EACH OF THOSE COLUMNS THAT YOU HAVE UP ON SLIDE 15 MAY PERFORM, IN COMBINATION, MULTIPLE LIMITATIONS, AND I WILL GRANT YOU THAT THAT MAY NOT BE A TERRIBLY EFFICIENT WAY TO PRACTICE THE INVENTION, BUT WHAT PRECLUDES A PARTICULAR COMPONENT OR SET OF -- OR PIECE OF CODE FROM PERFORMING MULTIPLE LIMITATIONS?

MR. LAMBERSON: SO THANKFULLY, I DON'T THINK WE EVEN HAVE TO WORRY ABOUT THIS ISSUE, AND LET ME EXPLAIN WHY.

THE CLAIMS ALL -- YOUR HONOR'S CLAIM CONSTRUCTION SAID THAT IT HAS TO BE A POINTER TO THE LOCATION OF DATA OR INFORMATION THAT IS EXTERNAL TO THE SOURCE MATERIAL, SO EXTERNAL TO THE DOCUMENT.

SO LET'S EVEN ACCEPT THAT THEY COULD DRAW THEIR BOX AROUND THIS AND SAY THIS IS ALL THREE THINGS. OKAY, FINE.

AT THE MOST, IT IS POINTING YOU TO A WORD IN THE DOCUMENT, WHICH IS NOT EXTERNAL. SO, THEREFORE, IT FALLS OUT OF THE COURT'S CLAIM CONSTRUCTION.

AND, AGAIN, SENTIUS MAY COME BACK AND SAY, WELL, IT'S INDIRECTLY POINTING YOU TO SOMETHING.

I JUST -- I RESPECTFULLY SUBMIT, YOUR HONOR, THAT THE WORD -- A WORD IN THE DOCUMENT IS JUST NOT A POINTER. IT DOESN'T PROVIDE ANY LOCATION INFORMATION. IT DOESN'T DIRECT YOU TO ANYTHING.

SO THIS ARGUMENT JUST DOESN'T HOLD TOGETHER FOR THE SAME REASON THAT THE -- FOR THE SAME REASON THAT THE FLAG ISN'T

POINTING YOU TO ANYTHING, THE WORD ALSO IS NOT. IT'S NOT WHAT WE'RE TALKING ABOUT HERE AS BEING A POINTER UNDER THE COURT'S CONSTRUCTION.

THE COURT: YOUR POINT IS THAT IN EITHER INSTANCE, NO EXTERNAL REFERENCE IS BEING IDENTIFIED?

MR. LAMBERSON: ABSOLUTELY RIGHT. THERE'S NO POINTER, DIRECTLY OR INDIRECTLY, TO ANY, ANY SPECIFIC SET OR SUBSET OF EXTERNAL REFERENCE MATERIALS WHICH ARE POTENTIAL CORRECTIONS.

ALL RIGHT. AND JUST FINALLY, I THOUGHT I'D JUST -- YOU KNOW, JUST TO EMPHASIZE, IT'S NOT JUST ME SAYING THIS, ME, MR. ATTORNEY FOR MICROSOFT.

WE ASKED MR. YAMANAKA ABOUT THIS AS WELL AND -- HE'S ONE OF THE INVENTORS. HE'S A PROGRAMMER. HE'S ONE OF SKILL IN THE ART. HIS ANSWERS, I THOUGHT, WERE VERY CANDID AND FRANK AND HE GAVE A VERY CONSISTENT, REPEATED ANSWER.

NOW, SENTIUS, THEY SHOW A PORTION WHERE HE SAYS, COULD A FLAG POTENTIALLY POINT TO SOMETHING, AND HE DID SAY POTENTIALLY, YOU KNOW, HYPOTHETICALLY MAYBE YOU COULD MAKE A FLAG THAT DID THAT.

BUT THEN I ASKED HIM, WELL, LET'S SAY IT'S JUST A BINARY 0 OR 1, TRUE OR FALSE?

OH, WELL, IN THAT CASE I WOULDN'T CONSIDER THAT POINTING TO SOMETHING. IT'S JUST TELLING ME THE STATE.

AND WHAT DO YOU MEAN BY THAT?

WELL, 0 MEANING NO, 1 MEANING YES.

I MEAN, THESE ARE FUNDAMENTAL DATA STRUCTURES. EVERY PROGRAMMER, EVERYONE OF SKILL IN THE ART KNOWS WHAT A FLAG IS AND KNOWS WHAT A POINTER IS. IT WOULD BE LIKE ASKING -- YOU KNOW, GOING TO A CARPENTER AND SAYING, ARE A SCREWDRIVER AND A HAMMER THE SAME THING?

NO. THEY'RE FUNDAMENTAL TOOLS. THEY DO DIFFERENT THINGS.

THE COURT: SO HE'S SAYING, RATHER EXPLICITLY, FLAG DOES NOT EQUAL POINTER?

MR. LAMBERSON: EXACTLY RIGHT. THAT'S HOW WE READ IT. AND WE DON'T SEE ANY OTHER WAY TO READ IT, RESPECTFULLY.

THEY'RE GOING TO TRY TO FOCUS ON THIS "POTENTIALLY," BUT WHEN HE'S ASKED ABOUT THE BINARY 0, 1 FLAG, HE COULDN'T BE MORE CLEAR.

AND, IN FACT, HE SAID IT OVER AND AGAIN. I PUT A COUPLE OTHER SLIDES. WE SUBMITTED HIS DECISION.

BUT SENTIUS CAME BACK AND ASKED, WELL, HOLD ON. YOU SAID SOMETHING ABOUT A FLAG NOT BEING THE SAME AS A LINK.

AND HE SAYS, WELL, YEAH, IN THAT CASE WE'RE TALKING ABOUT A BINARY FLAG. THAT'S NOT A LINK. WHEN YOU'RE TALKING BINARY, THAT'S NOT A LINK.

AND SENTIUS SAYS, WELL, UNLESS THE PROGRAM USES IT AS A LINK, RIGHT?

WELL, AGAIN, WE WERE TALKING ABOUT A BINARY FLAG, A 0, 1. AS A PROGRAMMER, THAT CANNOT BE USED AS A POINTER, IN MY

UNDERSTANDING. IT COULD BE USED AS A LOGIC DECISION POINT.

AND THERE'S MORE. AND HE SAYS, YOU KNOW, I THINK -- SO IT COULD GO IN THE REVERSE. IF YOU HAVE A POINTER, YOU COULD SET THE VALUE OF A POINTER TO 0 OR 1 IF YOU WANTED TO. SO A POINTER MAYBE COULD BE A FLAG IF YOU USED IT THAT WAY.

BUT HE SAYS, I WOULDN'T SAY A FLAG, IF IT'S BINARY, COULD BE A POINTER, BINARY VALUE. IF IT'S BINARY -- I FIND IT DIFFICULT TO BELIEVE, AND ON AND ON.

SO IT REALLY IS THE RARE CASE WHERE, YOU KNOW, YOU HAVE THE NAMED INVENTOR VERY CLEARLY ADDRESSING THE ISSUE NOW BEFORE THE COURT.

ONE FINAL POINT I WANTED TO MAKE IS ON DOCTRINE OF EQUIVALENTS, AND IT'S UNCLEAR TO ME HOW MUCH SENTIUS -- WHETHER THEY'RE PURSUING THIS THEORY OR NOT. IF -- WHAT I'M GOING TO SHOW YOU ON THE NEXT SLIDE IS WHAT THEY'VE ACTUALLY SAID ABOUT IT, AND I WOULD ASK YOUR HONOR, EVEN IF YOUR HONOR DISAGREES WITH EVERYTHING I'VE SAID ON POINTER, FLAG, LITERAL INFRINGEMENT, YOU SHOULD GRANT SUMMARY JUDGMENT ON DOCTRINE OF EQUIVALENTS BECAUSE THEY JUST HAVEN'T PUT IN THE EXPERT TESTIMONY THEY NEED TO SUPPORT THE THEORY.

AND THE FEDERAL CIRCUIT, I CITED ONE CASE HERE, BUT THEY'VE SAID IT OVER AND AGAIN. YOU NEED ACTUAL, EXPLICIT, YOU KNOW, WHY IS IT FUNCTIONALLY EQUIVALENT, SUBSTANTIALLY THE SAME FUNCTION, SUBSTANTIALLY THE SAME WAY, SUBSTANTIALLY THE SAME RESULT. YOUR EXPERT NEEDS TO WALK THROUGH THAT.

AND WHAT I'VE PUT ON THIS SLIDE, 21, AT THE TOP IS DR. MADISETTI'S ORIGINAL REPORT, AND I DIDN'T HIGHLIGHT ANYTHING BECAUSE HE DIDN'T EVEN REALLY GIVE ANY D.O.E. -- THIS IS FOR THE LINKING LIMITATION. I WOULD SUBMIT TO YOUR HONOR THAT WHAT'S IN HIS ORIGINAL REPORT, THERE IS NO D.O.E. ANALYSIS AT ALL. ALL HE SAYS IS THEY'RE NONETHELESS EQUIVALENT, AND THAT'S IT. I MEAN, THERE'S NO FUNCTION, WAY, RESULT. THERE'S NO ANALYSIS OF THIS ISSUE.

AND SO WHAT SENTIUS DID IN THEIR OPPOSITION IS THEY THEN PUT IN THIS DECLARATION, WHICH IS UNTIMELY. I MEAN, WE HAD AN EXPERT DISCLOSURE PERIOD. I WOULD ASK YOUR HONOR NOT TO CONSIDER, YOU KNOW, UNTIMELY EXPERT DECLARATIONS.

BUT EVEN IF YOU DO, EVEN THAT, THE MOST HE SAYS -- THE MOST I COULD FIND ABOUT IT -- MAYBE SENTIUS WILL SHOW SOMETHING ELSE -- BUT THE MOST I COULD FIND IS THIS LAST SENTENCE WHERE HE SAYS IT PERFORMS THE SAME FUNCTION -- WHICH IS NOT THE TEST, IT'S SUBSTANTIALLY THE SAME FUNCTION, BUT FINE -- THE SAME FUNCTION AS A POINTER FOR EXACTLY THE SAME PURPOSE IN EXACTLY THE SAME WAY.

HE DOESN'T SAY IT ACHIEVES THE SAME RESULT, WHICH IS ALSO PART OF THE TEST.

BUT MORE IMPORTANTLY, HE DOESN'T EXPLAIN WHY.

AND THE QUOTE I PUT ON THE PREVIOUS SLIDE BASICALLY SAYS YOU CAN'T JUST REFER BACK TO YOUR LITERAL INFRINGEMENT ANALYSIS, AND THAT'S EXACTLY WHAT HE'S TRIED TO DO HERE. HE

SAYS, WELL, I WALKED THROUGH IT LITERALLY, AND IF IT'S NOT THERE LITERALLY, IT'S EQUIVALENT.

AND THE CASES THAT HAVE THROWN THAT KIND OF ANALYSIS OUT ARE NUMEROUS, AND WE WOULD SUBMIT THAT EVEN IF YOU DON'T AGREE -- I HOPE YOU DO AGREE WITH US ON THE FLAG/POINTER ISSUE, BUT EVEN IF NOT, WE WOULD ASK THAT YOU CONSIDER GRANTING SUMMARY JUDGMENT OF NO DOCTRINE OF EQUIVALENTS INFRINGEMENT.

THE COURT: I TAKE IT WHAT YOU'RE SAYING IS THAT DR. MADISETTI'S ANALYSIS ON THIS POINT, THE D.O.E. POINT, IS KIND OF RETRO. IN THE LATE '80S, EARLY '90S, THIS IS WHAT YOU USED TO DO, I'M TOLD. THAT WAS A LITTLE BEFORE MY TIME.

BUT I TEND TO APPRECIATE YOUR POINT ABOUT THE FEDERAL CIRCUIT IS NOW TELLING US HOW TO FOLLOW.

GO AHEAD, MR. LAMBERSON.

MR. LAMBERSON: THAT'S ALL I HAD TO SAY ON THE LINKING ISSUE.

I DON'T KNOW IF YOU WANTED TO GO ISSUE BY ISSUE. MY REMAINING SLIDES ARE VERY BRIEF ON THE OTHER POINTS I WAS GOING TO MAKE, BUT IT'S UP TO YOUR HONOR.

THE COURT: WHY DON'T YOU MARCH US THROUGH THE REMAINING POINTS --

MR. LAMBERSON: OKAY.

THE COURT: -- AND THEN I'LL GIVE SENTIUS AN OPPORTUNITY.

MR. LAMBERSON: SURE.

SO THE NEXT ONE I WANTED TO HIT IS THE PRE-SUIT INDIRECT INFRINGEMENT ISSUE. AND TO BE CLEAR, WE'RE LIMITING THIS -- THIS IS ONLY BEFORE THE FILING OF THIS LAWSUIT.

AND WE HAVE NO ALLEGATION IN THIS CASE THAT SENTIUS EVER SENT MICROSOFT WHAT WE TYPICALLY CALL A NOTICE LETTER, HERE ARE OUR PATENTS, YOU NEED TO KNOW ABOUT THEM AND WE THINK YOU'RE INFRINGING THEM. NONE OF THAT.

THE FILING OF THE LAWSUIT WAS THE FIRST EVIDENCE WE HAVE THE MICROSOFT SPECIFICALLY KNEW ABOUT THE TWO RE-ISSUE PATENTS.

AND SENTIUS'S THEORY OF PRE, PRE-SUIT INFRINGEMENT BASICALLY, THEIR -- LET ME START BY SAYING THIS: THEIR DAMAGES THEY'RE SEEKING ARE FOR EVERY SINGLE SALE OF THE ACCUSED PRODUCTS THAT MICROSOFT MADE BETWEEN 2009 AND 2014, AND THE SUIT WAS FILED IN 2013.

SO THEY'RE BASICALLY SAYING EVERY SALE WAS EITHER AN ACT OF INDUCEMENT BY THE CUSTOMER THAT USED IT, OR CONTRIBUTING TO THE INFRINGEMENT OF ANOTHER.

AND IF THEY'RE GOING TO PURSUE THAT DAMAGES THEORY WHERE THEY'RE SAYING THAT WE WERE INDUCING AND CONTRIBUTING EACH AND EVERY ONE OF OUR CUSTOMERS TO INFRINGE --

THE COURT: WHICH IS WHAT I THINK THEY ARE SAYING.

MR. LAMBERSON: IT'S HOW I READ THEIR THEORY.

THEY NEED TO SHOW THAT WE KNEW ABOUT THE ASSERTED PATENTS.

AND THIS IS ANOTHER POINT WHERE WE HAVE NOT JUST THE FEDERAL CIRCUIT, BUT THE SUPREME COURT, I THINK, HAS STEPPED IN

AND BEEN VERY CLEAR FOR BOTH -- SO 271(B) IS INDUCEMENT, 271(C) IS CONTRIBUTORY INFRINGEMENT.

AND GLOBAL-TECH DEALT WITH INDUCEMENT, BUT THEY BASICALLY WERE LOOKING BACK AT WHAT THEY DID IN THE ARROW DECISIONS AND SAYING, WELL, WE'VE ALREADY SAID FOR CONTRIBUTORY, YOU HAVE TO HAVE KNOWN ABOUT THE PATENT, KNOWINGLY CONTRIBUTING TO THE INFRINGEMENT OF ANOTHER.

AND IN GLOBAL-TECH, THEY SAID WE'RE GOING TO EXTEND THAT TO INDUCEMENT AS WELL. YOU HAD TO HAVE KNOWN AND ACTIVELY INTENDED AND ENCOURAGED, WITH SPECIFIC INTENT, SOMEBODY ELSE'S INFRINGEMENT.

AND WE WOULD SUBMIT THAT YOU -- YOU KNOW, MICROSOFT CAN'T BE ACTIVELY INDUCING OR KNOWINGLY DOING ANYTHING WHEN THERE'S NO EVIDENCE, DIRECT OR CIRCUMSTANTIAL, THAT THEY EVER KNEW ABOUT THESE ASSERTED PATENTS.

AND SO WHAT IS SENTIUS'S RESPONSE? AND I WILL SAY, I WAS -- IT'S A NOVEL THEORY. I WILL GIVE THEM THAT.

THEY SAY, AS I READ THEIR THEORY, MICROSOFT KNEW ABOUT THE '720 PATENT AND THAT'S GOOD ENOUGH.

WELL, I WOULD SUBMIT TO YOUR HONOR, THERE'S NO CASE THAT HAS EVER SAID THAT, CERTAINLY IN THE RE-ISSUE CONTEXT, AND WE'LL GET TO THE ONE -- I THINK THEY'RE RELYING ON ONE CASE, THE SYNQOR CASE. WE'LL TALK ABOUT THAT IN A MINUTE.

BUT IN THE RE-ISSUE CONTEXT, THERE IS NO CASE THAT SAYS KNOWING ABOUT THE PRE RE-ISSUANCE PATENT SOMEHOW IMPLIES

ANYTHING ABOUT THE RE-ISSUE PATENTS.

AND IT JUST DOESN'T MAKE SENSE, BECAUSE IF YOU LOOK AT -- THE '720 PATENT IS IN THE RECORD WITH THE PRIOR PLEADINGS. I THINK IT WAS WITH THE CLAIM CONSTRUCTION WE SUBMITTED IT. THE '720 PATENT ON ITS FACE SAYS NOTHING ABOUT -- THAT IT WAS INVALIDATED, THAT IT WAS PUT INTO RE-ISSUE, THAT IT ACTUALLY CAME OUT AS A RE-ISSUED PATENT, OR WHAT THE CLAIMS OF THOSE RE-ISSUED PATENTS LOOK LIKE. SO IT JUST CAN'T BE THE CASE THAT KNOWING ABOUT THIS '720 PATENT WAS SUFFICIENT.

EVEN IF MICROSOFT -- YOU KNOW, SO SENTIUS HAS PUT IN A LOT OF EVIDENCE THAT MICROSOFT KNEW ABOUT THE '720 PATENT, AND I --

THE COURT: THERE'S REALLY NO DISPUTE ABOUT THAT.

MR. LAMBERSON: NO DISPUTE ABOUT THAT.

WELL, I WILL SAY I DON'T KNOW WHO AT MICROSOFT KNEW WHEN, AND THAT MAY BE RELEVANT FOR INDUCEMENT OR CONTRIB.

BUT WE ALL AGREE IT IS CITED ON SEVERAL MICROSOFT PATENTS OR PATENT APPLICATIONS, THE '720 PATENT.

NOT A SINGLE INSTANCE, EVER, THAT MICROSOFT CITED EITHER OF THE RE-ISSUE PATENTS IN THIS RECORD.

THE COURT: AND WHEN DID THE RE-ISSUES COME OUT?

MR. LAMBERSON: SO THE RE-ISSUES -- I HAVE A TIMELINE. THE FIRST OF THEM -- I HAVE HERE THE FILING DATE FOR THE '633. THE '731 CAME OUT BASICALLY THE SAME DAY, AND THE WAY THESE CONTINUATIONS WORK IS YOU'LL TYPICALLY, YOU'LL FILE IT RIGHT BEFORE THE OTHER ONE ISSUES. SO IT WAS JUNE OF 2009.

IT MAY HAVE BEEN JUNE 9TH OF 2009.

BUT THE POINT IS, BASICALLY -- AND I PUT THIS SLIDE -- THIS SLIDE WAS MORE TO ADDRESS THIS POINT, WELL, WE TOLD MICROSOFT ABOUT OUR PATENT RIGHTS AND THAT SHOULD BE GOOD ENOUGH.

WELL, FIRST OF ALL, THAT'S NOT WHAT THE LAW SAYS. YOU HAVE TO HAVE KNOWN ABOUT THE PATENTS.

BUT MOREOVER, THESE MEETINGS, WHEN THEY OCCURRED, '98, THE '720 PATENT DIDN'T EVEN EXIST IN '98. IT HASN'T ISSUED.

AND 2003, IT HAD ISSUED, BUT IT WAS INVALIDATED AND THEY WOULDN'T FILE THE '731 FOR TWO MORE YEARS AND IT WOULDN'T ISSUE FOR SIX MORE YEARS.

SO SAYING THAT MICROSOFT KNEW ABOUT THE '720 PATENT, YOU KNOW, FIRST OF ALL, THERE'S NO ALLEGATION THAT MICROSOFT KNEW ANYTHING OTHER THAN THAT THE '720 EXISTS. THAT'S THE ONLY -- THEY SAY, OH, WELL, WE HAVE CIRCUMSTANTIAL EVIDENCE.

THE ONLY CIRCUMSTANTIAL OR DIRECT EVIDENCE IS THAT MICROSOFT MAY HAVE KNOWN THE PATENT EXISTED. WE DON'T KNOW WHAT MORE THEY KNEW ABOUT IT. WE DON'T HAVE ANY EVIDENCE THEY WENT DIGGING THROUGH THE FLYSWAT CORRESPONDENCE AND PLEADINGS OR ANY OF THAT, WHICH IS PUBLIC RECORD. NO EVIDENCE OF THAT.

WE DON'T KNOW IF THEY DID A SEARCH. THEY SAY THEY COULD HAVE SEARCHED FOR IT IN PROSECUTION AND THAT COULD HAVE LED TO THEM FINDING THE RE-ISSUED PATENT'S EXISTENCE AND THAT COULD HAVE LED TO THEM LOOKING AT THE RE-ISSUED PATENTS. COULD HAVE, COULD HAVE, COULD HAVE.

THEY HAVE NO EVIDENCE OF ANY OF IT, DIRECT OR CIRCUMSTANTIAL. WHERE IS THE PROSECUTOR TESTIMONY THAT, WELL, WE ALWAYS DO SEARCHES AND THAT'S HOW WE FOUND THE '720 AND WE PROBABLY WOULD HAVE FOUND THIS. NOTHING. THERE'S NO EVIDENCE ON ANY OF THESE POINTS.

ALL WE HAVE IS THE BARE FACT OF THE '720 BEING CITED, NOTHING MORE. AND I PUT A QUOTE DOWN HERE -- THIS IS A CASE WITH A SLIGHTLY DIFFERENT CONTEXT. IT WAS A CASE THAT DEALT WITH WHETHER KNOWING ABOUT THE PRE RE-ISSUANCE PATENT AND THE FACT THAT IT WAS IN RE-ISSUANCE WAS ENOUGH TO GIVE SOMEBODY REASONABLE APPREHENSION OF SUIT, THAT THE PATENT WOULD COME OUT AND THEY WOULD BE SUED ON IT, AND THE FEDERAL CIRCUIT SAID, NO, ALL YOU KNOW IS THAT IT'S GONE INTO RE-ISSUE. YOU DON'T KNOW WHAT THE CLAIMS ARE GOING TO BE. AND THE FEDERAL CIRCUIT, IN FACT, SAID, "BEFORE ISSUANCE, WHAT THE SCOPE OF THOSE CLAIMS WILL BE 'IS SOMETHING TOTALLY UNFORESEEABLE.'"

AND SO WE'RE TALKING HERE ABOUT --

THE COURT: ISN'T THERE AN ANALOGY HERE, MR. LAMBERSON, TO KNOWLEDGE OF AN APPLICATION?

MR. LAMBERSON: I THINK THERE IS, AND WE CERTAINLY KNOW IN THE WILLFULNESS CONTEXT THAT THE FEDERAL CIRCUIT -- AND I DON'T HAVE ANY SLIDES ON IT, BUT IT'S IN OUR PLEADINGS -- AT LEAST TWICE, AND THESE WERE PRE-SEAGATE DECISIONS WHICH I THINK IS INTERESTING BECAUSE THE WORD WAS VERY DIFFERENT BACK THEN, BUT EVEN THERE, THE PLAINTIFF SAID, WELL, YOU KNEW ABOUT THE PATENT APPLICATION, THE FEDERAL CIRCUIT SAID THAT IS NOT ENOUGH BECAUSE WHO KNOWS WHAT THE CLAIMS WILL LOOK LIKE.

NOW I DID WANT TO TALK ABOUT SYNQOR, AND AS I SEE IT, THIS IS THE ONLY CASE THEY HAVE, AND I RESPECTFULLY SUBMIT THAT THE FACTS OF THIS CASE ARE VERY, VERY DIFFERENT AND THE PLAINTIFF THERE HAD MUCH MORE EVIDENCE, DIRECT AND CIRCUMSTANTIAL, TO THE RELEVANT POINTS.

SO WHAT DID THEY HAVE IN SYNQOR THAT'S NOT PRESENT HERE? FIRST OF ALL, IT WAS A COMPETITOR CASE. YOU HAD A CASE WHERE THEY SAID "SYNQOR PRESENTED TESTIMONY AND DOCUMENTARY EVIDENCE THAT ITS BUS CONVERTERS AND DATA SHEETS ARE MARKED WITH ITS PATENTS ONCE THEY ISSUE."

NO EVIDENCE HERE THAT THERE WERE DATA SHEETS OR THAT THEY WERE MARKED.

"IN THE EXTREMELY COMPETITIVE BUS CONVERTER INDUSTRY, IT IS COMMON FOR DEFENDANTS TO UNDERSTAND EACH OTHERS' PRODUCTS AND TO REVIEW EACH OTHERS' DATASHEETS."

WE'RE NOT TALKING HERE ABOUT A COMPETITIVE INDUSTRY. AND, IN FACT, SENTIUS ACTUALLY -- I THINK THE RECORD IS THAT THEY STOPPED SELLING ANY PRODUCTS IN 2003, AND THEIR OWN -- THIS IS IN THE RECORD -- THEIR OWN DAMAGES EXPERT SAID, I HAVE NO EVIDENCE THAT THESE ARE COMPETITORS. THEY'RE JUST NOT.

NO EVIDENCE THAT MICROSOFT WAS OUT MONITORING SENTIUS. IN FACT, THE RECORD FROM MR. BOOKMAN IS THEY APPROACHED MICROSOFT

LOOKING TO DO A DEAL.

FINE, THAT'S FINE. IT'S JUST VERY DIFFERENT FROM SYNQOR. I MEAN, WE'RE NOT TALKING ABOUT -- YOU KNOW, THIS WAS BASICALLY A CASE BETWEEN COMPETITORS IN THE CHIP INDUSTRY AND THEY ALL RELEASED DATASHEETS THAT SHOW THEIR CIRCUITS WORKED WITH THE PATENT MARKED ON IT. AND THE EVIDENCE -- THE TESTIMONY WAS, WE LOOK AT EACH OTHER'S STUFF, WE SEE THEIR DATASHEETS, WE HAD EVIDENCE THAT THEY ACTUALLY DID HAVE SOME OF THE DATASHEETS. WE HAD EVIDENCE OF ACTUAL REVERSE ENGINEERING AND IMITATION. WE HAD EVIDENCE OF ACTUALLY TEARING DOWN, SO TAKING THE CHIPS AND LOOKING AT HOW THEY WERE DONE.

AND CRITICALLY, I THINK CRITICALLY DIFFERENT FROM HERE, ONE OF THE DEFENDANTS IN THAT CASE ACTUALLY DID COME ACROSS ONE OF THE ASSERTED PATENTS THROUGH ALL THESE OTHER MECHANISMS.

THE COURT: OKAY.

MR. LAMBERSON: SO NONE OF THAT IS PRESENT HERE. WE DON'T HAVE ANY EVIDENCE AS TO HOW OR WHY THE '720 PATENT ENDED UP ON THESE MICROSOFT APPLICATIONS THAT SENTIUS CITES. WE DON'T KNOW IF THERE WAS SEARCHES THAT WERE DONE. MAYBE THE PATENT OFFICE JUST CITED IT AND IT GOT CARRIED FORWARD ON INFORMATION AND DISCLOSURE STATEMENTS. THE RECORD IS SILENT.

THE COURT: DO WE KNOW THAT THE '720 TURNED UP BECAUSE OF A PATENT OFFICE SEARCH AS OPPOSED TO AN IDS FROM THE APPLICANT?

MR. LAMBERSON: I THINK THERE IS EVIDENCE IN THE

PATENTS THAT SENTIUS GAVE THE COURT THAT IT HAPPENED BOTH WAYS. I DON'T KNOW WHICH CAME FIRST.

BUT WHAT WE DON'T HAVE IS ANY TESTIMONY TO SAY, HERE IS HOW MICROSOFT FIRST LEARNED OF THE '720 PATENT; OR FOR ANY OF THESE SPECIFIC APPLICATIONS, FOR THAT MATTER, HERE'S HOW WE LEARNED ABOUT IT FOR THIS APPLICATION. HERE'S THE SEARCH THAT WE DID. AND, FROM THAT, YOU CAN DRAW AN INFERENCE THAT THEY ALSO MAY HAVE FOUND THE RE-ISSUE PATENTS. WE DON'T HAVE ANY OF THAT IN THE RECORD.

AND SO, AGAIN, I JUST DON'T SEE HOW YOU CAN SAY -- AND SENTIUS WILL PROBABLY SAY, CIRCUMSTANTIAL EVIDENCE, CIRCUMSTANTIAL EVIDENCE.

WELL, YOU NEED EVIDENCE. YOU NEED A PIECE OF DATA FROM WHICH YOU CAN REASONABLY INFER ADDITIONAL FACTS. AND WHAT THEY HAVE IS ONE PIECE OF DATA THAT LEADS YOU NOWHERE, WE RESPECTFULLY SUBMIT.

AND AT THE END OF THE DAY, WE DO HAVE TO REMEMBER, WE'RE TALKING ABOUT STANDARDS THAT REQUIRE BASICALLY A RECKLESS ABANDON -- YOU KNOW, YOU'RE INTENTIONALLY OUT THERE TELLING PEOPLE, HERE'S HOW YOU INFRINGE SENTIUS'S PATENTS AND WE KNOW ABOUT YOUR PATENTS, NOW PLEASE GO INFRINGE THEM.

I MEAN, INDUCEMENT IS A MUCH HIGHER STANDARD THAN IT USED TO BE. AND THE IDEA THAT WITHOUT YOU KNOWING, WITHOUT ANY EVIDENCE WHATSOEVER THAT MICROSOFT EVEN -- I MEAN, EVEN IF THEY HAD EVIDENCE WE JUST KNEW ABOUT THE PATENTS IN PROSECUTION, I'D

PROBABLY STILL BE UP HERE ARGUING THAT'S NOT GOOD ENOUGH FOR INDUCEMENT.

BUT WE DON'T EVEN --

THE COURT: BECAUSE IT'S A SPECIFIC INTENT.

MR. LAMBERSON: RIGHT.

BUT WE DON'T EVEN HAVE THAT. WE HAVE LITERALLY NOTHING FROM WHICH TO ASSUME MICROSOFT EVER KNEW ABOUT THESE RE-ISSUE PATENTS PRE-SUIT.

AND AS WE MENTIONED IN OUR PLEADINGS, NOT TO PUT TOO FINE A POINT ON IT, YOUR HONOR, BUT THIS IS A SIGNIFICANT ISSUE. SIGNIFICANT MULTIPLE, TENS OF MILLIONS OF DOLLARS IN DAMAGES TURN ON THIS QUESTION, SO THAT'S WHY WE'VE RAISED IT AND WHY WE'VE ARGUED IT.

OH, AND ONE OTHER POINT I DIDN'T MAKE. THE IDEA THAT YOU CAN SOMEHOW SAY, WELL, WE KNEW ABOUT THE '720 PATENT, WE ALSO HAVE TO KEEP IN OUR MIND, THIS IS WHAT THEY DID TO THE '720 PATENT CLAIMS, AND WE TALKED ABOUT THIS IN THE BROADENING CONTEXT. BUT NO DISPUTE THESE CLAIMS LOOKED VERY, VERY DIFFERENT AFTER RE-ISSUANCE, SO I DON'T SEE HOW THEY CAN POSSIBLY SAY WE SHOULD HAVE READ WHAT WAS THERE BEFORE AND KNOWN WHAT WOULD COME LATER. I JUST DON'T SEE HOW THIS CASE SUPPORTS THAT KIND OF ARGUMENT.

ALL RIGHT. SO WILLFULNESS, THE ONLY POINT I WANTED TO MAKE ON WILLFULNESS, YOUR HONOR, IS ALL THE SAME POINTS APPLY. THEIR EVIDENCE, AGAIN, IS ONLY KNOWLEDGE ABOUT THE '720 PATENT

AND NOTHING ELSE. WE DON'T THINK THAT SUPPORTS WILLFULNESS.

BUT TO KEEP IT SIMPLE, I THINK WE NEED GO NO FURTHER THAN THE OBJECTIVE PRONG. AND I JUST PUT A TIMELINE UP WITH -- THE KEY FACT HERE, SO SENTIUS SUED US IN 2013, SUED MICROSOFT. MICROSOFT ANSWERED COUNTERCLAIMS SHORTLY AFTER WITH INVALIDITY AND NON-INFRINGEMENT.

AND WE'VE HAD -- YOUR HONOR HAS ACTUALLY HEARD NOW ABOUT BROADENING RE-ISSUE AND YOU'VE NOW HEARD ABOUT NON-INFRINGEMENT.

ALL OF THESE ARGUMENTS -- I PUT THE HEARING DATES ON HERE -- YOUR HONOR ONLY EVEN GOT THE CHANCE TO HEAR OUR DEFENSES AFTER SENTIUS'S PATENTS EXPIRED.

SO WE WOULD SUBMIT THAT ON THIS RECORD, THERE'S JUST NO QUESTION THAT WE HADN'T EVEN HAD OUR DAY IN COURT ON OUR DEFENSES. WE THINK THEY WERE REASONABLE. WE THINK THE PLEADINGS SHOW THEY WERE REASONABLE, AND SENTIUS HASN'T MOVED TO STRIKE OR SOUGHT SANCTIONS OR BROUGHT A SUMMARY JUDGMENT MOTION. I MEAN, SENTIUS'S BRIEF, I THINK, SAID WE THINK IT'S READY FOR TRIAL.

WELL, WE'VE OBVIOUSLY BROUGHT OUR OWN MOTIONS.

BUT THE POINT IS, OBJECTIVELY REASONABLE ON THIS RECORD, I THINK THERE JUST SHOULD BE NO QUESTION. SO WILLFULNESS SHOULD BE OUT OF THE CASE ON THAT PRONG ALONE.

AND THAT'S ALL I HAD AT THIS TIME, YOUR HONOR.

THE COURT: THANK YOU, MR. LAMBERSON.

MR. TRIBBLE.

MR. TRIBBLE: THANK YOU, YOUR HONOR.

I, TOO, HAVE SLIDES.

THE COURT: I WELCOME THEM. WHILE YOU'RE HANDING THOSE UP, I SHOULD NOTE, MY PLAN IS TO COMPLETE THE ARGUMENT ON THIS MOTION AND TAKE A LUNCH BREAK, SO REST ASSURED YOU'LL GET A CHANCE TO EAT SOMETHING.

MR. TRIBBLE: VERY WELL, YOUR HONOR.

THE COURT: THANK YOU, MR. RIVERA.

MR. TRIBBLE: MAY IT PLEASE THE COURT.

SO LET'S STEP BACK AND TALK ABOUT SUMMARY JUDGMENT.

IN THIS CASE, THESE -- HERE ARE THREE CORRECT STATEMENTS OF LAW: SUMMARY JUDGMENT MAY ONLY BE GRANTED ONLY IF NO REASONABLE JURY COULD FIND INFRINGEMENT; ALL INFRINGEMENT EVIDENCE MUST BE CREDITED; AND ALL JUSTIFIABLE INFERENCES MUST BE DRAWN IN SENTIUS'S FAVOR.

AND SO, FOR EXAMPLE, YOU HEARD THE QUOTATION OF TESTIMONY FROM THE SECOND INVENTOR ON THE PATENTS, WHO NOW WORKS FOR GOOGLE AND IS A HOSTILE WITNESS TO SENTIUS, AND, YOU KNOW, THERE WERE A FEW CHERRY PICKED QUOTES. I'VE GOT MY OWN, OKAY, THAT SAY THE OPPOSITE.

AND MOREOVER, I MEAN, IT'S A STATEMENT BY AN INVENTOR, YOU KNOW, AFTER THE PATENTS HAVE EXPIRED YEARS LATER SAYING, OH, OUR INVENTION WAS LIMITED TO THIS; OR, OH, A BINARY, A 0 OR A 1, YOU KNOW, A FLAG COULD BE A POINTER, BUT, OH, NOW THAT

YOU'VE CLARIFIED, THAT KIND OF FLAG CANNOT BE A POINTER. OKAY?

AND THESE ARE ALL STATEMENTS THAT THE JURY WILL GET TO CONSIDER. BUT THE INFERENCES CAN BE DRAWN, FROM THE SAME TESTIMONY BY THE SAME INVENTOR, IN OUR FAVOR.

AND, MOREOVER, YOU KNOW, THIS IS KIND OF A STRANGE SUMMARY JUDGMENT MOTION IN THAT THERE'S BEEN NO EXPERT DECLARATION SUBMITTED BY THE MOVANT. THE ONLY DECLARATION IS THE DECLARATION AND THE ATTACHED EXPERT REPORT OF DR. MADISETTI, A WELL QUALIFIED EXPERT WHO'S LOOKED AT ALL OF THESE ISSUES AND SPELLED OUT IN GREAT DETAIL THAT THERE IS INFRINGEMENT, THERE IS A LINK, THERE IS A POINTER, AND HERE IT IS AND EXACTLY HOW IT OPERATES.

AND THERE'S NOTHING REBUTTING THAT.

SO UNDER THOSE CIRCUMSTANCES, A REASONABLE JURY COULD FIND THAT THERE IS INFRINGEMENT OF THESE CLAIMS.

AND FINALLY, WE CITE THE THIRD CASE, THE PROVENZ CASE. "AS A GENERAL RULE, SUMMARY JUDGMENT IS INAPPROPRIATE WHERE AN EXPERT'S TESTIMONY SUPPORTS THE NON-MOVING PARTY'S CASE," AND THAT'S EXACTLY WHAT WE HAVE HERE.

AND I'M GOING TO HAVE TO WALK YOU THROUGH OUR THEORY AND WHAT DR. MADISETTI SAYS AND WHAT WE BELIEVE THE REST OF THE EVIDENCE SAYS AS WELL, AND ALSO THE CODE THAT WE'VE LOOKED AT, BECAUSE THERE WERE A LOT OF STATEMENTS MADE IN THE PRESENTATION EARLIER THAT ARE JUST NOT IN EVIDENCE. THEY'RE NOT IN THE SUMMARY JUDGMENT RECORD.

OH, YOU KNOW, THERE'S NO BENEFIT TO A TABLE. WELL, WE DIDN'T NEED TO USE A TABLE.

YOU KNOW, BASICALLY AT THE END OF THE DAY, THE ARGUMENT ALL COMES DOWN TO WHETHER THERE'S A LINK TO AT LEAST ONE OF THE EXTERNAL REFERENCE MATERIALS.

AND IT'S INTERESTING ABOUT THE ARGUMENT. TWELVE TIMES AT LEAST -- I THINK I MISSED A FEW -- BUT WHEN THE ARGUMENT WAS BEING MADE BY MICROSOFT, THEY WOULD GLOSS OVER THE FIRST PART OF THE COURT'S CONSTRUCTION, WHICH IS SIMPLY A POINTER TO DATA OR INFORMATION. THEY WOULD SKIP AHEAD -- IN FACT, THEY WENT BACK TO THE SLIDE AND LITERALLY SAID -- AND SKIPPED STRAIGHT TO THE LOCATION OF DATA OR INFORMATION. AND THAT'S EXACTLY WHAT'S -- WHAT THE ISSUE IS HERE.

MICROSOFT IS TRYING TO CONSTRUE THE CONSTRUCTION TO REQUIRE THAT A LINK OR POINTER CAN ONLY BE SOMETHING THAT IS A FILE PATH OR A LOCATION, AND THAT'S SOMETHING THAT THE COURT CONSIDERED AND REJECTED, AND I WON'T GO THROUGH THE ARGUMENTS ABOUT THE DEPENDENT CLAIMS REFERRING TO THE LINK AND THINGS LIKE THAT. WE HAD THE HEARING. IT IS WHAT IT IS.

BUT THE COURT'S CONSTRUCTION IS A POINTER CAN BE A POINTER TO DATA WHERE IT DOESN'T SPECIFY THE LOCATION OF THE DATA, AND THAT'S WHAT WE HAVE HERE.

AND SO JUST TO GIVE CONTEXT, HERE'S ONE OF THE ASSERTED CLAIMS, AND HERE'S WHERE THE LINKING STEP IS PERFORMED.

AND BY THE WAY, THERE'S NO ISSUE, IN OUR VIEW, THAT ALL OF

THESE STEPS ARE PERFORMED IN ORDER. THAT'S PART OF THE STUFF THAT'S NOT IN EVIDENCE, THIS IDEA THAT -- I DIDN'T UNDERSTAND THE ARGUMENT THAT WHEN YOU RIGHT CLICK, IT DOESN'T PULL UP ANYTHING.

BUT, I MEAN, YOU CAN -- WE'VE SUBMITTED A BUNCH OF EVIDENCE ON THIS, BUT YOU CAN DO IT YOURSELF. JUST TYPE IN MICROSOFT WORD. THE RED SQUIGGLE APPEARS, YOU RIGHT CLICK IT, AND THE POTENTIAL CORRECT WORDS POP UP. WE'LL WALK THROUGH THAT IN A LITTLE MORE DETAIL.

I BLEW UP THAT LINKING STEP AND I WANTED TO WALK THE COURT THROUGH SOME OF IT HERE.

SO KEEP IN MIND, THERE ARE TWO THINGS THAT ARE BEING LINKED -- AND THIS GOES TO ONE OF THE QUESTIONS THAT YOU ASKED. YOU'RE LINKING AT LEAST ONE OF THE DISCRETE PIECES -- AND IF YOU LOOK EARLIER IN THE CLAIM LANGUAGE, THOSE ARE THE DISCRETE PIECES OF THE SOURCE MATERIAL THAT HAVE BEEN -- THE SOURCE MATERIALS, LIKE THE MICROSOFT WORD DOCUMENT HAS BEEN CUT INTO DISCRETE PIECES, SAY, WORDS, AND SO THOSE ARE LINKED TO AT LEAST ONE OF THE EXTERNAL REFERENCE MATERIALS.

AND IT TELLS YOU HOW YOU DO THE LOOK UP, THE LINKING. YOU DO THE LINKING BY RECORDING SOMETHING IN A LOOK-UP TABLE. WHAT DO YOU RECORD? YOU RECORD THE STARTING AND ENDING POINT ADDRESSES OF THE DISCRETE PIECES.

AND HERE IS THE FINAL PART, A LINK.

AND SO LOOK AT WHAT'S AT ISSUE HERE RIGHT IN THE CLAIM

LANGUAGE. AS TO THE DISCRETE PIECES, YOU HAVE TO RECORD ADDRESSES, OKAY?

BUT AS TO THE LINK, YOU JUST PUT THE LINK IN THE TABLE. IT DOESN'T SAY IT HAS TO BE AN ADDRESS OR A FILE PATH OR A HYPERLINK OR ANYTHING ELSE. IT HAS TO BE A LINK, WHICH HAS BEEN CONSTRUED TO BE A POINTER TO DATA OR THE LOCATION OF DATA OR INFORMATION.

AND KEEP IN MIND THAT THE EXTERNAL MATERIALS CAN COMPRISE ANY OF TEXTUAL, AUDIO, VIDEO, AND PICTURE INFORMATION. KEEP THAT IN MIND BECAUSE THAT'LL BE IMPORTANT LATER AS TO MICROSOFT'S ARGUMENTS.

SO LET'S GO TO MICROSOFT WORD. AND THIS IS ALL SET OUT IN VOLUMINOUS DETAIL IN DR. MADISETTI'S DECLARATION AND IN HIS REPORT AND IN OUR 50-PLUS OTHER EXHIBITS THAT WE ATTACHED IN RESPONSE TO THE SUMMARY JUDGMENT MOTION.

AND SO LOOK AT HOW IT WORKS. SO YOU TYPE THE QUICK BROWN FOX JUMPS OVER THE, AND YOU HAVE TWO MISSPELLINGS.

AND SO LOOK AT WHAT WE HAVE HERE. WE HAVE THE WORD "BROWN" IS MISSPELLED, SO WHEN YOU RIGHT CLICK ON THE WORD "BROWN," IT BRINGS UP THE LIST ON THE LEFT AND IT PROPOSES POTENTIAL CORRECTIONS, BROWN, BORN, OR BORON, WHEREAS WHEN YOU CLICK ON THE MISSPELLING OF THE WORD "OVER," IT SHOWS JUST THE WORD "OVER."

SO THERE ARE TWO POINTS ABOUT THIS. THE FIRST IS THAT WHEN YOU CLICK ON DIFFERENT MISSPELLED WORDS, THEY ARE LINKED

TO DIFFERENT LISTS.

AND, SECOND, YOU CAN DO THIS A HUNDRED TIMES OVER, YOU CAN TYPE IT, YOU CAN SAVE IT AND RECALL IT, YOU CAN PASTE IT IN FROM AN E-MAIL OR SOMETHING, AND EVERY TIME YOU CLICK ON THE MISSPELLED WORD "BROWN" IN THAT CONFIGURATION, IT'S LINKED TO EXACTLY THE SAME LIST.

AND SO THAT'S THE LINKAGE -- THAT'S PART OF THE LINKAGE THAT WE'RE TALKING ABOUT. THAT'S THE EVIDENCE. THAT'S SOME OF THE EVIDENCE THAT THERE IS A LINK. THERE'S A LINK THAT'S BEEN RECORDED SOMEWHERE.

AND SO HERE'S A SUMMARY OF THE LINKING STEP AND THIS SUMMARIZES -- SLIDE 17 SUMMARIZES HOW DR. MADISETTI FEELS THAT THOSE PARTS OF THE CLAIM ELEMENT ARE SATISFIED.

AND I'LL JUST JUMP TO THE END WHERE IT REFERS TO "A LINK TO THE AT LEAST ONE OF THE PLURALITY OF EXTERNAL REFERENCE MATERIALS," AND IN DR. MADISETTI'S VIEW -- AND THIS IS FOR SURE A SUMMARY AND A PARAPHRASING -- "AN FERROR FLAG TO THE CORRESPONDING SUGGESTED CORRECTIONS FROM THE APPROPRIATE LANGUAGE SPELL CHECK OR GRAMMAR CHECK LIBRARY."

AND THAT'S SOMETHING THAT -- WE DIDN'T HEAR ANYTHING ABOUT GRAMMAR CHECK, AND I THINK IT'S IMPORTANT BECAUSE IT'S PART OF WHAT SHOWS THAT THE FERROR FLAG IS A LINK, AND I'M GOING TO WALK THROUGH THAT IN A LITTLE MORE DETAIL.

HERE WE'VE REPLACED THE SUMMARY OF DR. MADISETTI'S OPINIONS IN SLIDE 18 WITH SOME DEMONSTRATIVES OR SUMMARIES OF

HOW THE STEPS ARE, AND WE'RE GOING TO FOCUS ON THE MICROSOFT SPELLING PLC TABLE AND THE MICROSOFT GRAMMAR PLC TABLE.

BUT JUST IN PICTURE FORM, HERE'S HOW DR. MADISETTI HAS FOUND THAT IT WORKS. YOU'RE LINKING AT LEAST A PORTION OF ONE OF THE DISCRETE PIECES, HERE IT'S THE MISSPELLED WORD "BROWN" THAT'S BEEN CUT FROM THE SOURCE MATERIAL, AND IT'S LINKED TO THE SPELLING DICTIONARIES, AND THE LINKAGE IS IN THIS TABLE.

AND SO THERE ARE A FEW POINTS.

OH, AND THIS IS A DEMONSTRATIVE. IT SAYS START POINT AND END POINT ADDRESS. IT IS STORED IN THAT STARTING POINT, STARTING POINT, STARTING POINT. WE BELIEVE THAT IT'S LITERAL INFRINGEMENT AND D.O.E. THERE'S BEEN NO MOTION OR ARGUMENT RAISED ON THAT IN THE MOTION FOR SUMMARY JUDGMENT, SO I DON'T THINK THAT'S AN ISSUE HERE, BUT I JUST WANT TO POINT OUT THAT IS A DEMONSTRATIVE.

AND THEN IN THE THIRD COLUMN, YOU HAVE THE FERROR FLAG. AND SO -- AND IT'S THROUGH THAT FERROR FLAG THAT IT PROCESSES AND GETS THE ENGLISH SPELLING, POTENTIAL CORRECT SPELLINGS FOR THE MISSPELLED WORD "BROWN," AND IT DISPLAYS THEM ON THE SCREEN.

AND BY THE WAY, THIS DISPLAYING STEP, THE FINAL STEP THAT WAS POINTED OUT, THESE WORDS, BROWN, BORN, BORON, THOSE ARE IN THE EXTERNAL MATERIAL, THEY'RE IN THE ENGLISH DICTIONARY, AND THEY ARE DISPLAYED ON THE SCREEN.

THE COURT: THAT'S WHAT WE WERE LOOKING AT EARLIER.

MR. TRIBBLE: THAT'S CORRECT.

IN OTHER WORDS, YEAH, IT DOESN'T -- IT DOESN'T DISPLAY CODE, BUT THAT'S NONSENSICAL AND THERE'S NOTHING IN THE PATENT THAT IMPLIES THAT YOU CAN'T DO PROCESSING ON THE POINTER, AND WE'LL COME TO THAT IN A MINUTE.

BUT THINK ABOUT IT. THERE'S A LOT OF TALK, AND ESPECIALLY AT THE CLAIM CONSTRUCTION HEARING, THERE WAS A LOT OF ARGUMENT BY MICROSOFT THAT IT CAN BE DIRECT OR INDIRECT. THAT'S UNDISPUTED.

AND THAT THE INDIRECT CAN EVEN BE MULTIPLE INDIRECTS, OKAY, ALL OF WHICH REQUIRES EITHER THE APPLICATION OR THE OPERATING SYSTEM TO BE DOING PROCESSING, TO GO THROUGH THESE LINKS, THESE RINGS IN THE CHAIN OF THE LINK BETWEEN THE MISSPELLED WORD AND THE SPELLING DICTIONARY.

AND KEEP IN MIND, REMEMBER THE CLAIM LANGUAGE THAT WE LOOKED AT. THE LINKAGE, IT'S NOT JUST HERE'S A FILE PATH TO AN EXTERNAL REFERENCE. WHAT'S BEING LINKED ARE THE CUT PIECES.

AND SO PART OF WHAT IS BEING USED, IT'S NOT JUST THE FERROR FLAG, WHETHER IT'S 0 OR 1. IT'S ITS LOCATION IN THE TABLE SO THAT IT KNOWS WHICH WORD IT CORRESPONDS TO.

AND THAT INFORMATION IS USED AS INPUT FOR THE PROCESSING OF -- TO LINK UP THE EXTERNAL REFERENCE TO TELL YOU WHICH PART OF THE EXTERNAL REFERENCE TO USE.

SO WHEN IT SEES A MISSPELLED WORD "BROWN," YOU KNOW, IT'S PRETTY CLOSE, THEY TRANSPOSED TWO LETTERS, IT KNOWS -- BECAUSE

IT'S IN THAT PARTICULAR PART OF THE TABLE, IT KNOWS THAT THAT IS AN INPUT TO TELL IT WHICH PART OF THE SPELLING DICTIONARY TO LOOK UP.

THE COURT: MR. TRIBBLE, IS IT CORRECT, THOUGH, THAT -- WHAT YOU JUST SAID IS ACTUALLY HOW THE PRODUCT WORKS. IS THERE A LINK TO THE PART OF THE EXTERNAL REFERENCE MATERIAL OF INTEREST IN THIS TABLE? THAT'S THE PART I'M STRUGGLING WITH. HELP ME OUT WITH THAT IF YOU WILL.

MR. TRIBBLE: YEAH, ABSOLUTELY.

IN OTHER WORDS, THE LINK -- FIRST, IT'S THE POSITION OF THE FLAG IN THE TABLE SHOWS THAT IT CORRESPONDS TO B-O-R-W-N, AND THAT -- THE APPLICATION FOR PROCESSING KNOWS THAT'S WHERE IT PULLS UP THE WORD "BROWN," AS WELL AS "BORN" AND "BORON," IN THE EXTERNAL REFERENCE.

AND THERE'S NOTHING IN THE CLAIM LANGUAGE THAT SAYS YOU CAN'T HAVE ANY OTHER PROCESSING.

AND, IN FACT, IF YOU LOOK AT -- WE'LL COME BACK TO GRAMMAR IN JUST A SECOND.

I WANTED TO SKIP AHEAD TO -- HERE IT IS -- FIGURE 2 IN THE PATENT.

IN OTHER WORDS, YOU KNOW, THE PREFERRED EMBODIMENT OPERATES IN EXACTLY THE SAME WAY. YOU HAVE THE ADDRESSES OF THE CUT PIECES.

AND THEN IT SAYS TEXT, COMMA, 200.

FIRST OF ALL, TEXT IS NOT A FILE PATH OR ANYTHING. IT

SAYS GO LOOK IN THE TEXT. JUST LIKE IT COULD SAY DICTIONARY, GO LOOK IN THE DICTIONARY. OR GRAMMAR, GO LOOK IN THE GRAMMAR FILE.

NOW, THIS ONE, IT HAS 200, AND THEY CREATED A DEMONSTRATIVE THAT WAS NOT IN THE PATENT THAT THE WAY THEY VIEW IT, 200 IS THE EXACT ADDRESS.

BUT LOOK AT ALL OF THESE, PICTURES, SOUND, TEXT, AND THERE'S ONE NUMBER. AT MOST, IT'S THE BEGINNING OF A POSITION IN A LARGER EXTERNAL REFERENCE TO LOOK AT.

BUT IT DOESN'T SAY ANYTHING ABOUT HOW THE APPLICATION IS GOING TO PROCESS THAT AND FORMAT IT FOR THE DISPLAYING ON THE SCREEN OR THE PLAYING OF THE SOUND.

IN OTHER WORDS, IT'S GOT TO DETERMINE HOW BIG THE PICTURE IS. OR THE TEXT, YOU KNOW, WHAT FONT IS IT GOING TO DISPLAY IT IN, WHAT COLOR?

YOU KNOW, ALL OF THIS -- THERE'S NOTHING IN THE PATENT THAT TEACHES AWAY FROM WHAT ANY PERSON OF ORDINARY SKILL WOULD KNOW, WHICH IS THERE'S -- THE APPLICATION IS GOING TO HAVE TO BE DOING SOME PROCESSING IN ORDER TO DISPLAY THE PART OF THE EXTERNAL MATERIAL THAT IT WANTS TO SHOW.

THE COURT: YOU'RE SAYING THAT THE PROCESSING ALONE, THEREFORE, DOES NOT TAKE THIS OUTSIDE OF THE SCOPE OF THE LIMITATION?

MR. TRIBBLE: THAT'S CORRECT, YOUR HONOR.

AND LET ME GO BACK AND TALK ABOUT GRAMMAR.

THE COURT: LET ME STOP YOU THERE, MR. TRIBBLE. I THINK WE'RE GOING TO TAKE OUR LUNCH BREAK AT THIS TIME.

MR. TRIBBLE: THAT'S FINE.

THE COURT: I'LL GIVE EVERYONE A CHANCE TO EAT. WE'LL PICK THIS UP RIGHT AT 2:00 O'CLOCK.

ONE HOUSEKEEPING MATTER. I DO HAVE A COUPLE OF CRIMINAL MATTERS I NEED TO TURN TO AT 1:30, SO THERE WILL BE OTHER LAWYERS HERE. YOU'RE FREE TO LEAVE YOUR STUFF, BUT JUST FAIR WARNING, THERE WILL BE OTHER LAWYERS HERE.

MR. TRIBBLE: THANK YOU, YOUR HONOR.

MR. LAMBERSON: THANK YOU, YOUR HONOR.

THE COURT: WE'LL SEE YOU BACK HERE AT 2:00 O'CLOCK.

(THE LUNCH RECESS WAS TAKEN FROM 1:02 P.M. TO 2:41 P.M.)

AFTERNOON SESSION

THE COURT: MR. RIVERA, WHENEVER YOU ARE READY, SIR, AND ONCE OUR PREVIOUS CASE HAS CLEARED, PERHAPS WE MIGHT IMMEDIATELY RETURN TO THE MATTER THAT WAS SET.

THE CLERK: CALLING SENTIUS INTERNATIONAL, LLC VERSUS MICROSOFT CORPORATION, CASE NUMBER CV-13-825 PSG.

THE COURT: MR. TRIBBLE, I BELIEVE WE WERE TALKING ABOUT LOOK-UP TABLES AND LINKS.

MR. TRIBBLE: IT PUTS THINGS IN PERSPECTIVE, YOUR HONOR.

THE COURT: LET'S GET BACK TO IT.

MR. TRIBBLE: VERY WELL THEN.

BEFORE THE BREAK, WE WERE LOOKING AT SLIDE 22 AND I WAS EXPLAINING HOW, IN BOTH THE PREFERRED EMBODIMENT IN THE PATENT, AND IN THE MICROSOFT ACCUSED PRODUCTS, THEY HAD LOOK-UP TABLES THAT SPECIFIED ADDRESSES OF THE PIECES THAT ARE CUT, AND THEN THERE'S A FLAG OR A POINTER IN THE THIRD COLUMN THAT, WITH PROCESSING BY THE APPLICATION, IS USED TO DETERMINE EXACTLY WHAT TEXT OR OTHER EXTERNAL RELATED INFORMATION SHOULD BE RETRIEVED AND DISPLAYED ON THE SCREEN.

THE COURT: MR. TRIBBLE, WOULD YOU -- I WAS THINKING ABOUT THIS OVER THE LUNCH BREAK. WOULD YOU AGREE THAT ON THIS POINT, THE REAL DISPUTE HERE IS WHETHER A REASONABLE JURY COULD

FIND THAT THAT ADDITIONAL PROCESSING EITHER PRACTICES THE LIMITATION OR DOESN'T? IS THAT REALLY WHAT WE'RE GETTING AT HERE IS WHAT EFFECT, IN ANY, THAT ADDITIONAL PROCESSING HAS ON THE PRACTICE OF THIS LIMITATION BY THAT FLAG ALONE? IS THAT A FAIR READING?

MR. TRIBBLE: YES, YOUR HONOR, EXACTLY.

IN BOTH THE PREFERRED EMBODIMENT AND THE ACCUSED PRODUCTS, THERE'S PROCESSING.

NOW, THERE COULD BE MORE PROCESSING HERE IN THIS ACCUSED PRODUCT, BUT THAT'S NOT A LIMITATION. YOU KNOW, THE PATENT MAKES CLEAR -- AND I'M GOING TO SHOW YOU ONE MORE THING TO MAKE THIS CLEAR IN YOUR MIND, AND EVEN IN THE TESTIMONY, THE SOLE TESTIMONY I BELIEVE, THAT MICROSOFT RELIES ON AS ITS EVIDENCE TO CARRY ITS BURDEN OF SUMMARY JUDGMENT.

AND SO THIS -- ONE LAST POINT ON THIS. WHAT'S BEING LINKED IS THE ENGLISH SPELLING DICTIONARY, OKAY? THE APPLICATION PROCESSES IT. THEY COULD HAVE USED A DIFFERENT FORM OF POINTER THAT MAYBE SAID ENGLISH ONLY FROM THE GET-GO.

HERE IT SAYS, GO LOOK IN THE SPELLING REFERENCES.

AND BY THE WAY, THE CLAIM LANGUAGE IS "AT LEAST ONE OF THE PLURALITY OF EXTERNAL REFERENCE MATERIALS."

THAT'S A TERM THAT MICROSOFT SOUGHT FOR THE COURT TO CONSTRUE WHICH WAS NOT CONSTRUED. THE COURT FOUND THAT THE PLAIN AND ORDINARY MEANING OF THAT TERM SHOULD APPLY.

I SUBMIT THAT A DICTIONARY IS THE ARCHETYPE OF WHAT A

REFERENCE MATERIAL WOULD BE, EVEN AN EXTERNAL REFERENCE MATERIAL.

MICROSOFT IS TRYING TO CONSTRUE THIS TO SAY IT SHOULD ONLY REFER TO A PIECE OF ONE OF THE REFERENCE MATERIALS, OR IT SHOULD GIVE YOU THE ADDRESS. IN OTHER WORDS, IT WOULDN'T BE -- IT PROBABLY WOULDN'T EVEN BE GOOD ENOUGH TO TELL WHAT YOU PAGE IN THE DICTIONARY BECAUSE THERE WOULD BE MULTIPLE ENTRIES, OR IT MIGHT NOT EVEN BE GOOD ENOUGH TO TELL YOU WHICH NUMBERED DEFINITION WOULD BE GOOD ENOUGH BECAUSE THERE COULD BE MULTIPLE DEFINITIONS.

SO THERE'S SPELL CHECK.

THE GRAMMAR CHECK IS A SEPARATE TABLE. IT OPERATES IN A VERY SIMILAR WAY, SO I'M GOING TO SPEED THROUGH THIS A LITTLE BIT.

BUT YOU GET THE GREEN SQUIGGLY LINE INSTEAD OF THE RED.

THERE'S A TABLE, AGAIN, WITH A DIFFERENT FLAG, BUT IT'S ALSO CALLED FERROR.

AND SO THINK ABOUT THAT. YOU COULD HAVE HAD A FLAG THAT SAID S1 OR S0, YOU KNOW, FOR SPELLING, OR G1. OKAY?

INSTEAD, IT WAS IMPLEMENTED WITH THIS TYPE OF POINTER BECAUSE IT USED -- IT'S MORE EFFICIENT TO DO A LITTLE MORE PROCESSING.

BUT EVEN IN THE PREFERRED EMBODIMENT, THERE WAS PROCESSING, AND SO WE'LL GET TO THAT.

IT GIVES YOU SUGGESTED CORRECTIONS.

AND LET ME TURN TO THIS BECAUSE I JUST WANT TO GO THROUGH THIS ONCE. HERE WE GO.

SO LET'S SKIP AHEAD TO SLIDE 30 AND TALK ABOUT THE PREFERRED EMBODIMENT, OKAY?

AND, FRANKLY, THE WAY IT'S REPRESENTED IN THIS DEMONSTRATIVE, YOU SEE YOU HAVE TEXT, PICTURE, SOUND? IN THIS DEMONSTRATIVE, THOSE ARE SHOWN AS THREE SEPARATE REFERENCE MATERIALS.

BUT THERE IS SOME TESTIMONY BY THE CO-INVENTOR THAT -- OR ACTUALLY I'M NOT SURE IF THERE IS OR NOT. THE WAY IT WAS REPRESENTED IN MICROSOFT'S DEMONSTRATIVE, AT LEAST, WAS THAT THE TEXT, PICTURE, SOUND, THAT GIVES YOU A DATA TYPE OR SOMETHING AND THAT YOU LOOK AT RECORD 0, RECORD 100, RECORD 200, RECORD 300.

WELL, I MEAN, THAT'S EXACTLY THE SAME THING. IN OTHER WORDS, IT'S -- THERE HAS TO BE PROCESSING, OKAY? IT'S NOT JUST A SINGLE -- THE ENTIRE REFERENCE MATERIAL. SO OBVIOUSLY THERE HAS TO BE PROCESSING IN ORDER TO DISPLAY OR -- PLAY THE SOUND OR, YOU KNOW, DISPLAY ON THE SCREEN. THAT PIECE OF THE REFERENCE MATERIAL, YOU KNOW, WE, FRANKLY, INTERPRET IT AS THREE SEPARATE RESOURCES BECAUSE I'M NOT EXACTLY SURE HOW YOU PUT TEXT AND SOUND IN THE SAME THING.

I SUPPOSE IT COULD BE A DATABASE AND THESE COULD BE REFERENCES TO A DATABASE. THERE WOULD HAVE TO BE PROCESSES IN ORDER TO PULL UP THE PARTICULAR MATERIAL THAT YOU WANT AND THEN

FORMAT IT FOR DISPLAY.

AND SO, FOR EXAMPLE, INSTEAD OF SOUND AND PICTURES, IT COULD HAVE VERY WELL BEEN SPELLING AND GRAMMAR.

AND LOOK AGAIN AT FIGURE 3. I THINK THERE WAS A COMMENT MADE DURING THE MICROSOFT PRESENTATION ABOUT, WELL, WE PULL UP A LIST OF POTENTIALLY CORRECT WORDS.

BUT EVEN IN THE PREFERRED EMBODIMENT, WHEN YOU RIGHT CLICK ON THE SOURCE MATERIAL, IT PULLS UP SOME KIND OF JAPANESE OTHER WORD AND THEN IT GIVES YOU THE ENGLISH REFERENCE THAT YOU CAN PULL OVER AND IT SAYS JAPANESE ECONOMY.

AND THEN THERE ARE ADDITIONAL NOTES, AND SO YOU CAN PULL UP -- THROUGH PROCESSING, YOU CAN PULL UP DIFFERENT PIECES AND/OR LINK THEM TOGETHER FROM THE EXTERNAL REFERENCE MATERIAL.

AND BY THE WAY, IN BOTH THE ACCUSED PRODUCTS AND IN THE PREFERRED EMBODIMENT, THE TABLE IS CREATED AND THEN WHEN YOU RIGHT CLICK IT, THAT'S WHEN THE EXTERNAL MATERIAL IS MADE AVAILABLE TO THE USER AND THEY'RE LINKED IN THAT MANNER.

THE COURT: MR. TRIBBLE, THIS EXAMPLE THAT YOU HIGHLIGHT PERHAPS SUGGESTS THAT THIS IS SOMETHING I SHOULD HAVE RESOLVED AT CLAIM CONSTRUCTION.

WOULD YOU AGREE WITH THAT OR DISAGREE? I'M JUST TRYING TO FIGURE OUT HERE, IS THIS REALLY ULTIMATELY A MATTER OF FACT FOR THE JURY TO DECIDE, OR SHOULD I HAVE FIGURED THIS ONE OUT A YEAR AGO?

MR. TRIBBLE: WELL, THAT IS THE ELEPHANT IN THE ROOM, YOUR HONOR.

FRANKLY, I MISUNDERSTOOD WHAT YOU HAD SAID AT THE HEARING. YOU HAD CONSTRUED THE TERM AS POINTER, AND THE -- WHAT I THOUGHT YOU HAD SAID AT THE HEARING WAS THAT, BEFORE TRIAL, YOU WOULD ENTER A FULL CLAIM CONSTRUCTION OPINION.

I WENT BACK AND LOOKED AT THE TRANSCRIPT, AND IN FACT, WHAT YOU SAID WAS PRIOR TO ENTRY OF FINAL JUDGMENT.

THE COURT: I PICKED THAT WORD VERY CAREFULLY, MR. TRIBBLE.

(LAUGHTER.)

MR. TRIBBLE: AND SO, YES, YOUR HONOR, IT IS A CLAIM CONSTRUCTION ISSUE.

YOU KNOW, AT THE END OF THE DAY, YOU KNOW, COURTS ARE OF DIFFERENT MINDS ABOUT THIS, CONSTRUE EVERYTHING TO THE NTH DEGREE; AND OTHERS BELIEVE THAT, YOU KNOW, AT THE END OF THE DAY, IT'S OUR, PLAINTIFF'S, BURDEN TO PROVE INFRINGEMENT AND WE HAVE TO PUT ON THE EVIDENCE SHOWING THAT IT'S INFRINGED.

I THINK, FRANKLY, THE EXPERT REPORTS ARE DONE AND EVERYTHING AND WE'RE READY FOR TRIAL, YOU KNOW, SO I'M NOT GOING TO BELABOR THAT POINT. WE'RE, YOU KNOW, READY TO PROCEED UNDER THE COURT'S CLAIM CONSTRUCTION.

OKAY. SKIPPING AHEAD. THERE IT IS.

YOU KNOW, THIS IS PART OF THE DECLARATION BY DR. MADISETTI.

AND SO AT THE END OF THE DAY, YOU KNOW, OUR EXPERT SAYS

THE FERROR FLAGS, THOSE ARE POINTERS WITHIN THE COURT'S CLAIM CONSTRUCTION AND THE ASSERTED CLAIMS ARE INFRINGED.

THERE IS NO TESTIMONY OR EVIDENCE SUBMITTED BY MICROSOFT TO THE CONTRARY IN ORDER TO MEET THEIR BURDEN OF PROOF, WITH THE EXCEPTION, I BELIEVE, OF THE QUOTES BY THE CO-INVENTOR, WHICH WE'LL GET TO IN JUST TWO MORE SLIDES.

BUT FIRST, TAKE A LOOK AT THE TESTIMONY OF MICROSOFT'S 30(B)(6) WITNESS. HE WAS ASKED, "IN ANY EVENT, THE SYSTEM WILL GO TO THE ACTUAL RANGE OF TEXT POINTED TO BY THE FLAG AND THEN PULL UP THE APPROPRIATE LANGUAGE GRAMMAR CHECKER FOR THAT RANGE OF TEXT?

"ANSWER: YES. IN GENERAL, THAT'S A FAIR WAY TO DESCRIBE IT."

HE DIDN'T SAY, WHAT ARE YOU -- WHAT YOU SAID -- WHAT YOU ASKED ME MAKES NO SENSE BECAUSE A FLAG CANNOT BE A POINTER. IT CAN'T BE POINTING TO ANY TEXT.

INSTEAD HE SAID, YES, THAT'S A FAIR WAY TO DESCRIBE IT, THE WAY IT WORKS IN THE MICROSOFT ACCUSED PRODUCTS IN THIS CASE.

AND THEN HE TALKS ABOUT THE DETAILS ABOUT HOW THE API'S WORK.

AND THE LAST -- PART OF THE LAST QUESTION AND ANSWER PROVES OUR OTHER POINT THAT EVERY TIME YOU CLICK ON THE PARTICULAR TEXT THAT'S BEING LINKED TO THE EXTERNAL RESOURCE, YOU ALWAYS GET EXACTLY THE SAME RESULT. THAT IS A LINK.

NOW, IN -- AND MR. LAMBERSON TALKED ABOUT THIS IN THE CLAIM CONSTRUCTION HEARING, ABOUT HOW YOU CAN HAVE INDIRECT LINKS WHICH, BY DEFINITION, REQUIRE PROCESSING TO GET TO THE NEXT CHAIN.

THE COURT: THAT'S WHAT MAKES IT INDIRECT; RIGHT?

MR. TRIBBLE: CORRECT. AND HE SAYS, YOU KNOW, FILE PATH IS GET ANOTHER LINK -- I THINK HE MEANT THAT AS AN EXAMPLE -- THAT TAKES YOU TO THE FILE SYSTEM AND THEN YOU FIND YOUR CONTENT.

OKAY. HERE IT TAKES YOU TO THE SPELLING REFERENCES OR THE GRAMMAR REFERENCES AND THEN YOU FIND YOUR CONTENT THAT YOU WANT TO RETRIEVE AND DISPLAY.

AND TAKE A LOOK AT WHAT ELSE MICROSOFT SAID AT THE CLAIM CONSTRUCTION HEARING. YOU ASKED, WHAT IF I USED THE WORD "CONNECTION"?

AND HE SAID, I DON'T THINK -- "'CONNECTION' I JUST BELIEVE IS NOT THE RIGHT WORD, ONLY BECAUSE IN MY VIEW IT WOULD EXCLUDE SOMETHING LIKE A REFERENCE, AN ADDRESS, OR A REFERENCE NUMERAL."

AND SO THE FERROR FLAGS THAT TELL YOU, THE MICROSOFT APPLICATION, TO GO TO THE SPELLING REFERENCES, THAT'S A REFERENCE. THE FERROR FLAGS THAT TELL THE APPLICATION TO GO TO THE GRAMMAR REFERENCES MATERIALS, THAT'S A REFERENCE AS WELL.

AND HE SAYS, WE'RE NOT TRYING TO EXCLUDE THOSE. "WE DO AGREE THEY GET AT LEAST THAT MUCH, SO WE WOULDN'T WANT TO

EXCLUDE THAT. THAT'S WHY WE BELIEVE THE WORD 'POINTER' IS A PERFECTLY GOOD USAGE OF CHAINS THAT WE BUILT."

THAT IS THE MULTISTAGE PROCESSING THAT CAN BE PERFORMED WHEN TRIGGERED BY THE LINK THAT TELLS THEM TO LOOK IN THE SPELLING REFERENCES OR THE GRAMMAR REFERENCES. THOSE ARE THE CHAINS.

AND SO TAKE A LOOK -- I'M GOING TO GO FIRST TO SLIDE 38 BECAUSE WE PUT THESE IN THE WRONG ORDER. THIS IS, I BELIEVE, THE ACTUAL ORDER OF MR. YAMANAKA'S TESTIMONY, THE CO-INVENTOR WHO NOW WORKS FOR GOOGLE WHO WE BELIEVE IS A HOSTILE WITNESS. AND LET'S WALK THROUGH IT.

"WHAT IS A POINTER?

"A POINTER IS A REFERENCE TO AN OBJECT."

AND SO AS DR. MADISETTI SAYS, THE FLAG -- THE ERROR FLAGS ARE A POINTER BECAUSE THEY ARE REFERRING TO THOSE EXTERNAL OBJECTS.

AND THEN HE GIVES SOME EXAMPLES OF SOME KINDS OF POINTERS.

"WHAT DO YOU MEAN BY 'REFERENCE'?

"IT COULD BE A MEMORY POINTER, SO IT'S LIKE TELLING ME A MEMORY ADDRESS TO LOOK AT OR I WOULD ALSO CONSIDER IT TO BE SOMETHING LIKE A URL COULD BE A REFERENCE AS WELL."

"QUESTION: AND IT WOULD TELL YOU WHERE SOMETHING ELSE?

"ANSWER: YES, IT WOULD TELL ME SOMETHING WHERE IT'S LOCATED AND HOW TO ACCESS IT," THE PROCESSING.

NEXT QUESTION, NOT HIGHLIGHTED. "OKAY. HAVE YOU EVER

HEARD OF A FLAG?"

THIS IS THE WITNESS'S TESTIMONY THAT THEY'RE RELYING ON TO SAY, OH, NO, A BINARY FLAG, THAT CAN'T BE A POINTER.

HE SAYS, "HAVE YOU EVER HEARD OF A FLAG?"

"YES, IN MANY DIFFERENT FORMS."

THERE ARE DIFFERENT FORMS OF FLAGS.

AND SO THAT'S HIS TESTIMONY, IN ADDITION TO THE PART THAT IS DEAD-ON FOR OUR SIDE OF THE CASE. IT'S -- AT BEST IT'S CONFUSING AND, YOU KNOW, NOT SUFFICIENT TO CARRY THE BURDEN OF SUMMARY JUDGMENT.

OKAY. THEY ASK HIM, "WHAT TYPICALLY IS A FLAG?

"WELL, IN PROGRAMMING A FLAG IS USUALLY SOMETHING YOU SEE THAT INDICATES A STATE OF SOMETHING."

THAT IS THE MICROSOFT ARGUMENT.

"OKAY. IS THE FLAG THE SAME THING AS A POINTER?

"ANSWER," AND THIS, TO ME, MAY BE THE KEY TO THE WHOLE ARGUMENT, "IT DEPENDS ON HOW YOU'RE USING THE FLAG. I THINK YOU COULD SAY THAT A REFERENCE AND A FLAG ARE SOMEWHAT INTERCHANGEABLE," BUT "NOT COMPLETELY, NO."

AND WHAT DID HE SAY A POINTER IS? A POINTER IS A REFERENCE. AND HE'S NOW SAYING, "YOU COULD SAY THAT A REFERENCE AND A FLAG ARE SOMEWHAT INTERCHANGEABLE."

AND SO AT THE END, "SO THE FLAG COULD POINT TO SOMETHING?

"POTENTIALLY, JUST SO YOU UNDERSTAND WHAT IT'S -- THE FLAG IS INDICATING, I MEAN, WHAT IT IS REFERENCING."

AND SO IF THE APPLICATION IS PROGRAMMED TO RECOGNIZE WHAT THE FLAG IS REFERRING TO, TO DO FURTHER PROCESSING ON, THAT IS A POINTER.

THE COURT: AND IS THAT WHAT'S GOING ON HERE WITH THE FLAG AND THE LOOK-UP TABLE WE'RE TALKING ABOUT? IS THE APPLICATION RECOGNIZING THAT AS A POINTER?

MR. TRIBBLE: YES. MR. SETH WANTED ME TO GO BACK AND CLARIFY THIS FOR THE COURT. I WASN'T SURE IF IT WAS NECESSARY.

BUT WHAT HAPPENS IS YOU HAVE THE TABLE, AND LET'S JUST TAKE THE SPELLING SITUATION, YOU'VE GOT AN FERROR FLAG, AND SO WHEN IT'S A 1, IT KNOWS, I'M GOING TO GO LOOK IN THE SPELLING RESOURCES.

THE COURT: UM-HUM.

MR. TRIBBLE: THEN THE PROGRAM IS PROGRAMMED, IT -- THE INPUTS THAT THE APPLICATION IS USING TO QUICKLY PICK OUT WHICH PART OF THE SPELLING REFERENCES NEED TO BE RETRIEVED AND DISPLAYED, IT'S ALL PROGRAMMED INTO THE APPLICATION.

THERE'S A LANGUAGE RECOGNIZER. YOU REMEMBER THE ARGUMENT ABOUT THEY WERE SAYING YOU COULD SAY N IS ALWAYS SPANISH, OKAY.

I THINK I WOULD SAY AN "N," OKAY, MIGHT BE AN INDICATION TO LOOK IN THE SPANISH DICTIONARY.

SO THAT'S PART OF THE PROGRAMMING. BUT THE POINT IS, IT TELLS IT WHERE IT'S GOING TO LOOK, NOT IN THE GRAMMAR RESOURCES, OKAY, NOT IN THE SOUND FILES, BUT IN THE SPELLING RESOURCES.

OH, AND SO THEN -- NOW LET ME GO BACK TO THE PRIOR SLIDE WHERE MR. YAMANAKA LATER TESTIFIED IN HIS DEPOSITION, "YOU TESTIFIED" -- "NOW, EARLIER I BELIEVE YOU TESTIFIED THAT THERE ARE SOME CIRCUMSTANCES IN WHICH A FLAG COULD BE A POINTER, IF THE PROGRAMMING ALLOWED FOR THAT.

"ANSWER: IF YOU'RE REFERRING TO EARLIER TODAY, YES, I DID."

AND SO HE GIVES AN EXAMPLE. "SO CAN YOU, FOR EXAMPLE, CONCEIVE OF A FLAG BEING INTERPRETED BY THE PROGRAMMING TO REFER TO A PARTICULAR PLACE TO LOOK UP A DICTIONARY?"

AND HE TALKS ABOUT C AND CPU CONSTRAINTS, BUT HE SAYS AT THE END, "AND IF IT WAS NOT NULL, THEN I --" IF THE FLAG WERE NOT NULL, "THEN I WOULD IMMEDIATELY INTERPRET IT AS ACTUALLY POINTING TO SOMETHING. HYPOTHETICALLY, THAT COULD BE THE CASE."

THE COURT: "NOT NULL" JUST MEANS THERE'S A 1?

MR. TRIBBLE: THAT'S RIGHT.

AND OTHER PARTS OF HIS DEPOSITION WERE CITED AS MICROSOFT'S SOLE BASIS FOR ITS MOTION ON THIS POINT, AND WHERE THEY ASKED HIM, WELL, WHAT IF IT'S BINARY?

AND HE MAKES CLEAR IN HIS DEPOSITION, AS WE'VE CITED, THAT HE'S NEVER SEEN THE MICROSOFT CODE, HE DOESN'T KNOW HOW THE MICROSOFT ACCUSED PRODUCTS OPERATE, AND SO WHEN HE SAYS, IT JUST DEPENDS ON HOW IT'S PROGRAMMED, YOU KNOW, HOW THE PROGRAM RECOGNIZES IT, TO USE IT.

AND THEN I THINK THEY CITED THIS, THE MARC BOOKMAN TESTIMONY, THEY -- HE TESTIFIED SOMETHING, AND I CAN'T REMEMBER WHAT IT WAS, BUT THE REBUTTAL POINT ON THIS IS MR. BOOKMAN TESTIFIED, I AM -- HE'S TALKING ABOUT THE ACTUAL REDUCTION TO PRACTICE OF HIS PREFERRED EMBODIMENT, THE TRANSLATION SOFTWARE THAT HE WAS SHOWING MICROSOFT AND TRYING TO SELL.

HE TESTIFIED, "I AM CERTAIN THAT IF WE DECIDED TO MAKE THIS," THE FLAG, I MEAN THE POINTER, THE LINK, "A ZERO OR A ONE, THAT WE WOULD HAVE BEEN ABLE TO IMPLEMENT IT THIS WAY. I DO BELIEVE THAT IF WE WENT WITH A ZERO OR A ONE FOR THE INSTRUCTIONS HERE IN THE LINK COLUMN THAT, YES, THE SOFTWARE WOULD HAVE WORKED."

THE POINT IS, IF YOU WROTE THE APPLICATION TO RECOGNIZE WHAT A 0 OR A 1 MEANS AND HOW TO USE THAT LINKED, YOU KNOW, IN THE MICROSOFT EXAMPLE WITH THEY HAVE THE ACTUAL CHARACTER STRING, THAT'S OBVIOUSLY THE FASTEST WAY TO LOOK UP IN THE ENTIRE ONE OF THE PLURALITY OF EXTERNAL REFERENCE MATERIALS, THE DICTIONARY, IT'S ALPHABETICAL, AND SO THAT'S THE FASTEST WAY TO LOOK IT UP.

BUT IT'S HOW YOU WRITE THE PROGRAM TO PROCESS AND EXECUTE AFTER BEING TRIGGERED BY THE LINK.

THE COURT: AND SO IS IT DR. MADISETTI'S TESTIMONY THAT FILLS THAT GAP BETWEEN THE FLAG AND THE EXTERNAL REFERENCE?

MR. TRIBBLE: CORRECT.

WE CITED THIS -- THIS IS AN AT&T PATENT. IT'S NOT AN ADMISSION BY MICROSOFT. IT'S ABOUT HARDWARE, NOT SOFTWARE. IT'S ABOUT THE ENCODING ON A CIRCUIT BOARD.

OUR ONLY POINT HERE IS THIS WAS IN 1989, OKAY, AROUND THE RELEVANT TIME FOR A PERSON OF ORDINARY SKILL IN THE ART, AND THEY REFER TO THE TRANSMISSION OF THE 8-BIT CODE EFFECTIVELY RAISES A FLAG OR POINTER, THE 1 IN A CERTAIN POSITION.

SO DEPENDING UPON WHICH BIT IS 0 OR 1, THE DEVICE KNOWS WHAT TO DO WITH THAT. OKAY?

AND IT'S SIMILAR WITH THE SOFTWARE. IF IT'S 0 OR 1, THE PRODUCTS KNOW WHAT TO DO WITH IT.

AND SO AT THE -- I GUESS IN CLOSING, I'D GO BACK TO SLIDE 3, BUT WE DON'T HAVE A GRAPHICS GUY HERE, SO NONE OF US KNOW HOW TO JUMP BACK TO SLIDE 3.

THE COURT: I'VE GOT IT.

MR. TRIBBLE: OKAY. SO AS YOU RECALL, THE QUESTION ON SUMMARY JUDGMENT IS, COULD A REASONABLE JURY FIND INFRINGEMENT? WE BELIEVE THAT THE EVIDENCE SHOWS THAT THEY CAN.

IF THE NON-MOVANT SUBMITS AN EXPERT DECLARATION SHOWING A PRIMA FACIE CASE OF INFRINGEMENT, SUMMARY JUDGMENT IS NOT APPROPRIATE, AND ESPECIALLY IN THIS CASE WHERE DR. MADISETTI SAYS THE FERROR FLAGS, YES, THOSE ARE POINTERS.

NOTHING RELIABLE ON THE MICROSOFT SIDE TO REBUT THAT.

THEREFORE, FOR THAT REASON, WE WOULD REQUEST THAT SUMMARY

JUDGMENT BE DENIED.

NOW, I'M GOING TO SKIP -- I BELIEVE THEY SKIPPED OVER DIRECT INFRINGEMENT. THIS IS IN THE BRIEF. YOU KNOW, WE POINT OUT THAT MICROSOFT CERTAINLY USES ITS PRODUCTS AND HAS TESTED ITS PRODUCTS. YOU KNOW, WE CITE EVIDENCE TO THAT EFFECT.

AND, YOU KNOW, AT THE END OF THE DAY, IN ORDER TO -- AT THE TIME OF HYPOTHETICAL NEGOTIATION, TO RECEIVE A LICENSE TO USE OUR INVENTION, EVEN FOR TESTING PURPOSES OR FOR THEIR OWN USES, YOU KNOW, WE BELIEVE THAT THERE WILL BE TESTIMONY AT TRIAL THAT SENTIUS WOULD HAVE DEMANDED A LICENSE THAT WOULD HAVE DEMANDED A REASONABLE ROYALTY FOR ANY PRODUCTS THAT WERE SOLD AS A RESULT OF THAT DEVELOPMENT AND TESTING. THAT'S IN THE BRIEF. I WON'T SAY ANYTHING MORE ABOUT THAT.

NOW, WILLFUL INFRINGEMENT. THE WILLFUL INFRINGEMENT AND THE PRETRIAL INDUCEMENT ISSUE, THEY KIND OF GO TOGETHER.

ON WILLFUL INFRINGEMENT, IN MICROSOFT'S MOTION, AT LEAST THE WAY WE READ IT, YOU KNOW, THERE WAS NO -- AND THIS GOES TO THE INDUCEMENT PART, AND I'M KIND OF GOING TO ARGUE THESE TOGETHER --

THE COURT: SURE.

MR. TRIBBLE: -- BUT THEY RAISE THIS SPECIFIC INTENT REQUIREMENT. BUT IT WASN'T RAISED IN THEIR MOTION, AT LEAST AS WE CAN SEE.

AND SO THE SOLE ISSUE, I BELIEVE, THAT WAS BRIEFED WAS, DID MICROSOFT KNOW ABOUT THE PATENTS PRIOR TO THE FILING OF THE

LAWSUIT?

AND IT IS TRUE, IT'S ABSOLUTELY CORRECT THAT OUR POSITION IS THERE IS TONS OF CIRCUMSTANTIAL EVIDENCE SHOWING THAT, IN FACT, MICROSOFT DID DO IT -- WAS AWARE OF THE PATENTS, AND WE CITE THE CASES LIKE TV INTERACTIVE, WHICH WAS ACTUALLY AGAINST MICROSOFT WHERE THEY SAID THE REFERENCE TO THE PLAINTIFFS' '156 PATENT ON A FORM, YOU KNOW, SUBMITTED TO THE PTO IN PROSECUTION INDICATES THERE IS A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER MICROSOFT HAD ACTUAL NOTICE OF THE '156 PATENT AT THAT TIME FOR A WILLFULNESS CLAIM.

OKAY. THAT'S FINE. BUT LOOK AT THE SYNQOR CASE, AND IT IS TRUE, WE DO RELY ON THE SYNQOR CASE, FEDERAL CIRCUIT, 2013. I BELIEVE THAT'S AFTER ANY OF THE CASES CITED BY MICROSOFT.

"A JURY MAY REASONABLY INFER MICROSOFT'S KNOWLEDGE OF THE REISSUE PATENTS FROM ITS KNOWLEDGE OF THEIR PREDECESSOR '720 PATENT."

YOU KNOW, I CAN'T IMAGINE A BETTER CASE THAT FITS THESE CIRCUMSTANCES, BOTH AS TO WILLFULNESS AND AS TO THE INDUCEMENT.

SO THEY HAD ACTUAL NOTICE OF OUR '720 PATENT, AND IT SHARES THE SAME SPECIFICATION.

AND RECALL THE WHOLE POINT OF THE RE-ISSUE WAS TO CORRECT THE ORDERING, WHAT WE VIEW AS A MISTAKE IN CLAIM CONSTRUCTION IN A PRIOR LITIGATION, AND WE'LL GET TO IT IN A MINUTE, BUT THE POINT FOR NOW IS THAT MICROSOFT CITED THE '720 OVER AND OVER AND OVER AGAIN TO THE PTO. IT'S CITED MORE THAN 40 TIMES IN

MORE THAN A DECADE.

AND, YEAH, SOME OF THOSE WERE BEFORE THE RE-ISSUES OCCURRED IN 2005 AND 2009.

BUT IT GOES -- WE FOUND AND SUBMITTED EVIDENCE ALL THE WAY UP TO JUNE OF 2013. THEY KEPT CITING THE '720 EVEN AFTER THE RE-ISSUES.

AND SO TO US, THAT IS CIRCUMSTANTIAL EVIDENCE. ANYONE CITING PRIOR ART -- I MEAN, IT'S NOT LIKE THEY'RE WRITING A LETTER TO THEIR CONGRESSMAN, OKAY? THEY'RE CITING PRIOR ART RELEVANT TO THEIR OWN INVENTIONS.

I WONDER WHAT FIELD THOSE INVENTIONS ARE IN?

WELL, IF YOU LOOK AT THE PATENTS, OKAY, IT'S IN THE FIELD OF WORD PROCESSING, SPELL CHECKING, GRAMMAR CHECKING. AND THEY KEPT CITING THIS OVER AND OVER AGAIN.

IT WOULD MAKE NO SENSE TO CITE THE '720 AND NOT TAKE A LOOK AT WHAT ELSE WAS FURTHER IN THE CHAIN IN THAT SAME FAMILY OF PATENTS, AND WE'VE CITED THOSE IN OUR BRIEF, INCLUDING THE JUNE 2013 INFORMATION DISCLOSURE STATEMENT THAT MICROSOFT FILED WITH THE PATENT OFFICE.

AND SO, YOU KNOW, WE BELIEVE THAT THE CIRCUMSTANTIAL EVIDENCE PROVIDES THE BASIS FROM WHICH A REASONABLE JURY COULD CONCLUDE THAT, IN FACT, MICROSOFT DID KNOW OF THE PATENTS.

AND, YOU KNOW, IF YOU READ THE I4I OPINION, IT'S VERY SIMILAR.

AND SO NOW LET'S TALK ABOUT THE PRE-SUIT DAMAGES FOR

INDUCEMENT AND CONTRIBUTORY INFRINGEMENT.

AND BY THE WAY, THERE'S NO -- I DON'T THINK THERE'S A MOTION FOR SUM ON POST-SUIT DAMAGES. IT'S ONLY AS TO PRE-SUIT DAMAGES.

AND, AGAIN, WE RELY ON THE TV INTERACTIVE CASE -- THAT WAS A MICROSOFT CASE -- AND SUMMARY JUDGMENT TO PRECLUDE PRE-SUIT DAMAGES FOR INDIRECT INFRINGEMENT WILL BE DENIED IF THE CIRCUMSTANTIAL EVIDENCE INDICATES THAT THE DEFENDANT HAD PRE-SUIT KNOWLEDGE OF THE PATENT-IN-SUIT OR A RELATED PATENT.

AS WE'VE JUST WALKED THROUGH IN PART, MICROSOFT HAD LONG BEEN ON NOTICE OF AT LEAST THE PREDECESSOR TO THE RE-ISSUED PATENTS, AND IF YOU LOOK, WE'VE SUBMITTED THE TESTIMONY OF MR. BOOKMAN TALKING ABOUT HIS MEETINGS IN -- I THINK IT WAS IN 1998 AND 2003. HE HAD NUMEROUS MEETINGS, EXCHANGED NUMEROUS E-MAILS WITH MICROSOFT, AND IT WAS ALL TALKING ABOUT HIS TECHNOLOGY, WHICH HE CALLED RICHLINK, THAT HE DISCUSSED USING IT WITH THE MICROSOFT PRODUCTS. THE MATERIALS, HE SAYS, WERE MARKED "PATENT PENDING," AND THE PATENT APPLICATIONS WERE AVAILABLE AT THE PATENT OFFICE.

THEY MARKED ON THEIR WEBSITE, STARTING IN '99 I BELIEVE THAT SAYS -- YEAH, IT'S '99 -- AND IN THE NUMEROUS E-MAILS, WHICH WE ALSO CITED IN OUR BRIEFS.

AND I WANTED TO PUT UP THEIR SLIDE -- IF YOU LOOK AT THEIR SLIDE 27 -- ABOUT FACTS IN THE SYNQOR CASE NOT PRESENT HERE.

AND, REMEMBER, AFTER DISCUSSING THE TECHNOLOGY, IT WAS

AFTER THAT THAT WE KNOW MICROSOFT WAS AWARE OF THE '720 BECAUSE IT CITED IT OVER 40 TIMES TO THE PATENT OFFICE.

AND SO THE FACTS FROM SYNQOR ARE NOT PRESENT HERE. SYNQOR PRESENTED TESTIMONY AND DOCUMENTARY EVIDENCE THAT ITS BUS CONVERTERS AND DATA SHEETS ARE MARKED WITH ITS PATENTS ONCE THEY ISSUE.

THE TESTIMONY BY MR. BOOKMAN WAS THAT THEY WERE MARKING, OKAY? SOFTWARE TYPICALLY DOESN'T HAVE A DATA SHEET, OKAY?

YOU KNOW, SYNQOR IS A HARDWARE CASE.

IN THE EXTREMELY COMPETITIVE BUS CONVERTER INDUSTRY, IT IS COMMON FOR THE DEFENDANTS TO UNDERSTAND EACH OTHERS' PRODUCTS AND TO REVIEW EACH OTHERS' DATA SHEETS.

THEY HAD NUMEROUS MEETINGS WITH MICROSOFT IN TWO DIFFERENT YEARS, YOU KNOW, TRYING TO EXPLORE THE POSSIBLE USES MICROSOFT COULD MAKE OF THE SENTIUS TECHNOLOGY.

AND THEY WERE COMPETITORS, AT LEAST IN THE SENSE THAT SENTIUS WAS ALSO MEETING WITH OTHER COMPETITORS OF MICROSOFT, SUCH AS SUN MICROSYSTEMS AND OTHERS, TO SEE IF THEY WOULD BE INTERESTED IN THE TECHNOLOGY.

THERE WAS SIGNIFICANT EFFORT BY THE DEFENDANTS IN THIS CASE TO CROSS/IMITATE SYNQOR'S PRODUCTS.

WE DON'T HAVE -- ALL WE HAVE ON THAT, YOUR HONOR, IS THE STRIKING SIMILARITY THAT THEY USED THIS TABLE FORMAT.

THE ARGUMENT WAS MADE BY MICROSOFT TODAY, WE DON'T EVEN NEED TO USE A TABLE WHICH, OF COURSE, BEGS THE QUESTION, THEN

WHY ARE YOU USING IT?

AND THEN THE LAST BULLET POINT THAT THEY MADE IS AT LEAST ONE DEFENDANT HAD ACTUALLY LOCATED ONE OF THE THREE ASSERTED PATENTS.

WELL, THE JUDGMENT WAS AFFIRMED AS TO ALL THE DEFENDANTS, NOT JUST THE ONE.

SO, YOU KNOW, I DON'T THINK THAT THE -- THAT TRYING TO DISTINGUISH SYNQOR AT THE END OF THE DAY CARRIES MUCH WEIGHT.

AND SO AS TO BOTH WILLFULNESS AND THE DAMAGES FOR PRE-SUIT INDIRECT INFRINGEMENT, WE'D REQUEST THAT THE MOTION FOR SUMMARY JUDGMENT BE DENIED AS TO THOSE AS WELL.

THANK YOU.

THE COURT: THANK YOU, MR. TRIBBLE.

MR. LAMBERSON, I'LL GIVE YOU A BRIEF REBUTTAL AND THEN WE CAN TURN TO THE OTHER MOTIONS.

MR. LAMBERSON: VERY BRIEF, YOUR HONOR.

I DO THINK WE'RE BACK TO CLAIM CONSTRUCTION AGAIN. WE HAD A DISCUSSION ABOUT WHAT THE CONSTRUCTION SHOULD BE. YOUR HONOR CHOSE POINTER.

I WOULD ASK YOUR HONOR TO THINK ABOUT WHAT DOES THAT MEAN? I UNDERSTOOD THE COURT TO MEAN A POINTER HAS TO TELL YOU WHERE SOMETHING IS. IT HAS TO GIVE YOU THAT LOCATION INFORMATION. THAT'S CERTAINLY WHAT WE MEANT WHEN WE ADVOCATED THE CONSTRUCTION.

I THOUGHT THAT WAS WHAT THE COURT, WHEN THE COURT ADOPTED

WHAT WE PROPOSED, THAT IT WAS AGREEING WITH OUR PROPOSAL.

AND IF YOU DO REQUIRE -- IF THAT'S THE COURT'S UNDERSTANDING, THEN I THINK WE'RE DONE.

YOU KNOW, SENTIUS POINTS TO ALL THIS PROCESSING THAT HAPPENS AFTER A RIGHT CLICK, AFTER THE SELECTION.

IF ALL OF THAT IS REQUIRED TO SOMEHOW DO THE LINKING, THEN IT DOESN'T SATISFY THE CLAIMS BECAUSE THE CLAIMS REQUIRE YOU TO CREATE THAT LINK BEFORE THE SELECTION.

AND IF THE FLAG, BY ITSELF, DOESN'T GIVE YOU THAT LOCATION INFORMATION, THEN YOU'RE DONE. IF YOU NEED TO DO ALL THIS OTHER -- AND NOBODY IS SAYING THAT YOU CAN'T HAVE -- THAT THE SOFTWARE LATER IN THE CLAIMS CAN'T LOOK AT THE LINK AND FOLLOW IT. THAT'S NOT WHAT WE'RE SAYING.

WE'RE SAYING, THOUGH, THAT THERE HAS TO BE A LINK IN THE FIRST PLACE. THERE HAS TO BE A POINTER IN THE FIRST PLACE. THERE HAS TO BE SOME LOCATION OF SOMETHING, AND THE FLAG IS NOT THAT.

THE COURT: HOW DO YOU SQUARE THAT, MR. LAMBERSON, WITH THE CONSTRUCTION THAT MAKES CLEAR LOCATION IS JUST ONE OF TWO POSSIBILITIES FOR A POINTER? THE CONSTRUCTION SAID DATA OR LOCATION, DID IT NOT?

MR. LAMBERSON: WELL, THE POINTER -- WELL, IT SAID IT WAS A POINTER TO THOSE THINGS.

I APOLOGIZE. IT'S NOT ON HERE.

THE COURT: THAT'S FINE.

MR. LAMBERSON: SO -- THERE WE GO.

GOING BACK TO THE COURT'S CONSTRUCTION, I HAVE A CLEAN ONE AT THE START HERE.

THE COURT: THAT'S IT.

MR. LAMBERSON: "POINTER" IS THE FIRST WORD IN THE CONSTRUCTION, AND SO IT HAS TO BE A POINTER. BEFORE YOU GET TO WHAT IT'S POINTING TO, IT HAS TO BE A POINTER.

IT CAN BE A POINTER TO DATA OR INFORMATION, SO IT COULD BE A POINTER DIRECTLY TO SOME PIECE OF DATA YOU'RE INTERESTED IN, OR IT COULD BE A POINTER TO THE LOCATION OF DATA OR INFORMATION.

BUT IN EITHER INSTANCE, IT HAS TO BE A POINTER. THAT'S THE FUNDAMENTAL ISSUE.

THE COURT: YOUR POINT IS THAT NO REASONABLE JURY COULD FIND THAT A FLAG IS A POINTER, AND SO WE'RE DONE?

MR. LAMBERSON: THAT'S IT. YES, IT'S THAT SIMPLE.

AND I THINK SENTIUS'S ARGUMENT -- YOU KNOW, I'M LEFT ASKING MYSELF, WHAT ARE THEY SAYING IT'S A POINTER TO?

I MEAN, THEY'RE CERTAINLY SAYING THE PROGRAM, THE PROGRAM DOES SOMETHING AFTER YOU CLICK AND SOME RESULTS ARE DISPLAYED.

WELL, NOBODY DISPUTES THAT.

BUT THAT'S NOT THEIR CLAIM. YOU KNOW, THEY DON'T HAVE A CLAIM -- IF IT WAS THEIR CLAIM, IT WOULD BE PURELY FUNCTIONAL AND WE WOULD BE MAKING DIFFERENT ARGUMENTS.

YOU KNOW, IS IT REALLY THE CASE THAT YOU DON'T NEED ANY,

ANY POINTER AT ALL, ANY LOCATION DIRECTION AT ALL IN THE LOOK-UP TABLE? WHAT IS THE LOOK-UP TABLE DOING AT THAT -- DOING THEN IF IT'S NOT GIVING YOU THIS POINTER?

SO THE LOOK-UP TABLE HAS MEANING IN THIS CLAIM, AND THE COURT HAS GIVEN IT A MEANING, AND THE COURT'S MEANING WAS THAT YOU HAD TO HAVE A POINTER IN THE TABLE. SOMETHING ELSE IN THE TABLE ISN'T GOING TO DO IT.

A FEW OTHER QUICK POINTS.

YOU KNOW, AND THE ARGUMENT WE HEARD OVER AND AGAIN -- THEY LIKE TO SHOW THE SCREEN SHOT THAT, YOU KNOW, THEY LOOK VISUALLY SIMILAR.

WELL, THAT -- AGAIN, NOBODY IS -- THERE'S SORT OF TWO ROADS YOU CAN GO HERE. YOU CAN SEARCH FOR SOMETHING EVERY TIME IF YOU WANT TO, IN OTHER WORDS, GO THROUGH THE WHOLE DICTIONARY, LOOK FOR WHAT YOU'RE LOOKING FOR; OR YOU CAN HAVE A POINTER AND IT'S POINTING YOU TO SOMETHING.

AND THOSE ARE TWO FUNDAMENTALLY -- BASICALLY THEY'RE THE OPPOSITE APPROACHES TO DOING SOMETHING.

AND JUST BECAUSE THEY LEAD TO THE SAME RESULT -- IF I SEARCH THROUGH THE WHOLE DICTIONARY TO LOOK FOR SOMETHING VERSUS IF I'M POINTED RIGHT TO IT, CAN I FIND SOMETHING BOTH WAYS? YES.

BUT THAT DOESN'T PROVE THAT BOTH WAYS OPERATED THE SAME USING A LOOK-UP TABLE WITH A LINK.

SO THE EXAMPLE WE GAVE IN OUR REPLY BRIEF WAS IF I, IF

I -- IF THE COURT READS THE CONSTITUTION, ARTICLE III IS GOING TO READ THE SAME NO MATTER HOW MANY TIMES YOU READ IT. IT'S THE SAME TEXT.

I DIDN'T -- YOU KNOW, I CAN GIVE YOU A POINTER TO THAT REGION OF THE CONSTITUTION, YOU CAN READ IT, IT'LL BE THE SAME EVERY TIME. I CAN NOT GIVE YOU A POINTER. YOU CAN JUST DECIDE YOU'RE GOING TO READ IT ONE DAY AND IT'S GOING TO BE THE SAME.

SO JUST PUTTING UP SCREEN SHOTS, I JUST WANT TO MAKE CLEAR, THAT IS NOT PROVING THAT THERE IS A LOOK-UP TABLE WITH WHAT THE COURT HAS SAID HAS TO BE IN THAT TABLE.

AND EVEN JUST SAYING YOU CAN GET SOMEWHERE EVENTUALLY -- THE PROGRAMMING KNOWS HOW TO GET THERE. WELL, ONCE SENTIUS SAYS THAT, THEY'RE RIGHT, THE PROGRAM KNOWS. THAT DOESN'T MEAN THAT THE LOOK-UP TABLE KNOWS OR THAT THERE'S A POINTER IN THAT LOOK-UP TABLE THAT TELLS YOU. THAT'S THE KEY PIECE HERE.

AND IF WE LOOK AT THE WHOLE LIMITATION, YOU KNOW -- REMEMBER, THIS LIMITATION, YOU HAVE TO DO THE LINKING. IT'S A LINKING STEP. CREATING THE LINK IS AN ACTIVE METHOD STEP THAT HAPPENS RIGHT BEFORE SELECTION, AND IT HAS TO BE CREATED AT THAT POINT IN TIME AND IT HAS TO GIVE YOU THAT POINTER.

THIS IS WHERE THE POINTER HAS TO EXIST, NOT, YOU KNOW, SOME PROCESSING WAY DOWN THE ROAD THAT KNOWS HOW TO GET THERE AND LOOKS AT THE FLAG.

I MEAN, THEIR ARGUMENT IS BASICALLY -- YOU COULD EXPAND IT TO SAY THAT EVERY PIECE OF CODE IN THE SOFTWARE IS A POINTER IN

SOME GRAND, METAPHYSICAL SENSE BECAUSE ALL OF IT IS EXECUTED AND YOU EVENTUALLY GET THE RESULTS.

I MEAN, THAT'S BASICALLY THEIR ARGUMENT HERE IS THAT, WELL, IF IT'S ONE PIECE OF CODE AND THAT GETS YOU A LITTLE FURTHER, THAT'S GOOD ENOUGH.

AND THAT'S JUST NOT WHAT THE COURT SAID WHAT IT SET ITS CONSTRUCTION. IT HAS TO BE IN THE TABLE, NUMBER ONE; AND IT HAS TO BE POINTING TO SOMETHING, NUMBER TWO.

ALL RIGHT. SO LET'S SEE. THAT MAY BE IT ON THE POINTER PIECE.

THE COURT: MR. LAMBERSON, CAN I JUST --

MR. LAMBERSON: SURE.

THE COURT: -- RETURN TO ONE POINT ON THIS THAT YOU RAISED?

MR. LAMBERSON: YES.

THE COURT: THIS CONSTRUCTION I ADOPTED, THIS WAS ESSENTIALLY MICROSOFT'S CONSTRUCTION; CORRECT?

MR. LAMBERSON: THAT'S RIGHT.

THE COURT: OKAY.

MR. LAMBERSON: I BELIEVE IT'S VERBATIM ACTUALLY, YOUR HONOR.

THE COURT: I RECALL IT BEING SUCH, BUT I APPRECIATE THAT.

MR. LAMBERSON: VERY SIMILAR.

THE COURT: ALL RIGHT. ANY OTHER REBUTTAL POINTS YOU

WANT TO MAKE? I DO WANT TO GIVE YOU A FULL CHANCE ON THE DAUBERTS AS WELL.

MR. LAMBERSON: YEAH, LET ME JUST GET TO THE -- I DID WANT TO MENTION VERY BRIEFLY THE DIRECT INFRINGEMENT ISSUE.

I JUST WANTED TO SAY, THE REASON WE RAISED THIS WAS A CONCERN THAT I THINK HAS NOW BEEN VALIDATED BY WHAT MR. TRIBBLE SAID.

SENTIUS'S DAMAGES THEORY, TO BE CLEAR, IS BASED ON END USER USAGE OF THE PRODUCT. WE BELIEVE THAT CAN LEGALLY ONLY BE AN INDIRECT INFRINGEMENT CLAIM.

WHAT I HEARD MR. TRIBBLE SAY IS, WELL, WE'RE ENTITLED TO ALL SALES THAT RESULT FROM THE DEVELOPMENT AND TESTING, AND THAT'S WHY WE MOVED ON DIRECT INFRINGEMENT AS WELL.

I DON'T THINK THAT'S LEGALLY CORRECT, AND I DON'T EVEN THINK WE HAVE TO GET THERE BECAUSE OF THE FAILURE OF PROOF, BUT I JUST WANTED TO PREVIEW THAT.

BUT IF THE COURT DOES DENY OUR MOTION ON DIRECT INFRINGEMENT, I THINK WE'RE GOING TO BE BACK HERE ARGUING ABOUT WHAT DAMAGES CAN YOU GET FROM MICROSOFT'S OWN INTERNAL USAGE AND TESTING? THAT'S REALLY THE FUNDAMENTAL ISSUE THAT'S NOT QUITE RIPE YET BECAUSE WE JUST BROUGHT THE PREDICATE ISSUE.

ALL RIGHT. THE LAST POINT IS JUST ON THIS INDUCEMENT/WILLFULNESS PIECE. I JUST WANTED TO POINT OUT, BOTH TVI AND SYNQOR, THERE WAS ACTUAL EVIDENCE OF KNOWLEDGE OF AT LEAST ONE OF THE ASSERTED PATENTS, FUNDAMENTALLY DIFFERENT FROM

HERE.

IT WAS NOT -- THEY PUT A -- I DON'T KNOW IF THEY WERE TRYING TO PARAPHRASE OR MAKE A POINT. IT MADE IT LOOK LIKE IT WAS FROM SYNQOR AND MENTIONED RE-ISSUE.

NOT THE CASE. THERE WAS NO RE-ISSUE APPLICATIONS OR PATENTS AT ISSUE IN SYNQOR THAT I'M AWARE OF. THAT WASN'T THE FACTS THERE.

THE FACTS WERE IN BOTH TVI AND SYNQOR, THE DEFENDANT ACTUALLY CAME ACROSS ONE OF THE ASSERTED PATENTS. VERY, VERY DIFFERENT FROM HERE.

I'D ALSO POINT OUT TVI IS PRE-SEAGATE, PRE-DSU, PRE-GLOBAL-TECH. HIGHLY QUESTIONABLE WHETHER IT'S STILL GOOD LAW.

AND THE LAST THING, JUST THIS POINT ABOUT THE MEETINGS WITH MICROSOFT. I WAS LEFT WITH THE IMPRESSION, SORT OF THE INSINUATION THAT MICROSOFT MAY HAVE TAKEN SOMETHING.

I JUST WANT TO REMIND THE COURT THAT IN '98, WHICH WAS THE TIME OF THE FIRST MEETING, MICROSOFT HAD ALREADY PUBLICLY RELEASED, IN OFFICE 95, BACKGROUND SPELL CHECK, AND OFFICE 97, BACKGROUND GRAMMAR CHECK. SO BOTH SQUIGGLES WERE OUT THERE. MICROSOFT DIDN'T TAKE ANYTHING FROM SENTIUS TO PUT IN THERE. SO THERE'S NO EVIDENCE OF THAT IN THE RECORD.

AND THE PATENTS AT THAT POINT -- THE '720 DIDN'T EVEN EXIST AND THE RE-ISSUES WOULDN'T BE FILED FOR, I THINK, A DECADE AFTER THAT.

SO THAT'S IT, YOUR HONOR.

THE COURT: THANK YOU.

ALL RIGHT. WHY DON'T WE TURN TO THE DAUBERT MOTIONS, IF WE COULD? ALL THINGS BEING EQUAL, I'M PARTICULARLY INTERESTED IN ARGUMENT ON THE WECKER REPORT, SO UNLESS ANYONE HAS A STRONG OPINION ABOUT WHICH ONE TO ADDRESS FIRST, I'D LIKE TO START WITH THAT.

MR. GLITZENSTEIN: YOUR HONOR, KURT GLITZENSTEIN FOR MICROSOFT.

I WAS INTENDING TO ARGUE THE MILLS MOTION FIRST, ONLY BECAUSE --

THE COURT: THAT'S NOT -- I'M NOT WED TO THAT.

MR. GLITZENSTEIN: -- IT'S MORE OF A GLOBAL MOTION.

THE COURT: I WAS JUST PREVIEWING WHAT CAUGHT MY EYE, BUT I'M HAPPY TO TAKE THE WECKER ARGUMENT FIRST -- SORRY -- THE MILLS ARGUMENT.

MR. TRIBBLE: YOUR HONOR, I'M NOT INVOLVED IN THIS ARGUABLY. MAY I BRIEFLY BE EXCUSED?

THE COURT: OF COURSE.

MR. TRIBBLE: ALL RIGHT. THANK YOU.

MR. GLITZENSTEIN: GOOD AFTERNOON, YOUR HONOR. MAY I PROCEED?

THE COURT: PLEASE.

MR. GLITZENSTEIN: THANK YOU, YOUR HONOR.

SO SWITCHING GEARS CONSIDERABLY HERE, YOUR HONOR, AWAY

FROM FLAGS AND POINTERS TO THEIR DAMAGES CASE, YOUR HONOR, AND IT REALLY -- I URGE THAT WE START WITH MR. MILLS, BECAUSE MR. MILLS IS THE, THE EXPERT WHO SORT OF COLLECTS THEIR WHOLE DAMAGES THEORY.

AND HIS ANALYSIS, YOUR HONOR, IS REALLY NOTABLE IN MANY RESPECTS, BUT I THINK IT REALLY IMPLICATES ALMOST EVERY MAJOR RECENT FEDERAL CIRCUIT DECISION ON THE ISSUE OF DAMAGES, AND AS THIS COURT KNOWS, THE APPEALS COURT HAS BEEN SCRUTINIZING DAMAGES AWARDS VERY, VERY CLOSELY; FRANKLY, MORE OFTEN THAN NOT, BY MY TALLY, REJECTING THEM AND SENDING THEM BACK FOR A NEW TRIAL, WHICH IS SOMETHING WE'RE EARNESTLY HOPING TO AVOID HERE.

IT REALLY IS THE SECOND REGARD IN WHICH MR. MILLS' ANALYSIS IS ALSO I THINK PARTICULARLY NOTABLE, IT REALLY STANDS OUT RELATIVE TO THE WAY I SEE A LOT OF DAMAGES ISSUES BEING FRAMED, AND THAT IS THE EXTENT TO WHICH HE REALLY HINGES HIS ANALYSIS SO CRITICALLY ON WHAT HAPPENED IN OTHER LITIGATIONS.

HE REFERS TO A LOT IN HIS REPORT, BUT HE SORT OF BOILS IT DOWN TO TWO, ONE BEING THE LUCENT JMOL AND THE OTHER BEING THE ARENDI SETTLEMENT.

THE SECOND SORT OF PILLAR -- SO THAT'S SORT OF THE HISTORICAL EVIDENCE THAT HE SORT OF LATCHES ON TO.

THE SECOND PILLAR IS DR. WECKER'S SURVEY ANALYSIS, WHICH OF COURSE WAS SORT OF WHOLLY CREATED FOR PURPOSES OF THIS LITIGATION.

SO WHEN YOU SORT OF STAND BACK AND ASK, WHAT ARE THE SORT OF REAL WORLD INDICIA OF THE TYPES OF THINGS THAT A PERSON ACTUALLY INVOLVED IN THE HYPOTHETICAL NEGOTIATION -- THAT'S THEIR THEORY, YOU KNOW, IT'S SITTING DOWN ACROSS THE BARGAINING TABLE BEFORE THERE'S ANY THREAT OF LITIGATION -- ARE THESE THE TYPES OF THINGS THAT PEOPLE IN THAT CONTEXT, IN THAT SETTING, LOOK TO?

THE COURT: AND YOU LOOK AT -- WE'LL GET TO THE WECKER ANALYSIS IN A MOMENT -- BUT AS TO THE RELIANCE UPON LUCENT AND ARENDI, YOU'RE SAYING THAT THOSE ARE METHODOLOGICAL ERRORS?

MR. GLITZENSTEIN: FUNDAMENTAL METHODOLOGICAL ERRORS, YES, YOUR HONOR.

AND JUST TO REALLY START THERE, I MEAN, WHAT I OBSERVE IN THE FEDERAL CIRCUIT -- I APOLOGIZE, YOUR HONOR. I HAVE A VERY SMALL NUMBER OF SLIDES. MAY I HAND THEM UP?

THE COURT: OH, SURE, OF COURSE. YOU CAN HAND THOSE TO MR. RIVERA IF YOU'D LIKE.

MR. GLITZENSTEIN: I'LL GET THE HOUSEKEEPING OUT OF THE WAY THERE.

THE COURT: GO AHEAD.

MR. GLITZENSTEIN: YOUR HONOR, FROM WHAT I OBSERVE FROM MY REVIEW OF THE FEDERAL CIRCUIT AUTHORITY WITH REGARD TO, SORT OF LET'S PUT IT IN THE CATEGORY OF WHAT HAPPENED WITH REGARD TO OTHER TRANSACTIONS OR ISSUES INVOLVING OTHER PARTIES, I SEE A SPECTRUM. I SEE -- SORT OF AT ONE END OF THE SPECTRUM, I SEE THE, THE ISSUE OF --

THE COURT: IT'S LIKE A WALK DOWN MEMORY LANE ON THIS SLIDE.

MR. GLITZENSTEIN: WELL, YOU KNOW, THESE ISSUES DO TEND TO RECUR.

AND SO WHERE THERE ARE ARM'S LENGTH AGREEMENTS, THE FEDERAL CIRCUIT HAS SPOKEN TO THIS A NUMBER OF TIMES, I THINK MOST RECENTLY WAS THE VIRNETX DECISION A FEW MONTHS AGO, THEY'VE GOT TO BE TECHNICALLY AND ECONOMICALLY COMPARABLE, AND THE COURT HAS MADE CLEAR THAT THOSE ARE REAL AND MEANINGFUL STANDARDS THAT HAVE TO BE CONSIDERED AT THE DAUBERT STAGE FOR ADMISSIBILITY.

AND THEN WE GET TO SORT OF THE ISSUE THAT COMES CLOSEST TO THIS CASE, I THINK, AND THAT'S SETTLEMENT AGREEMENTS.

NOW, HISTORICALLY, LONG HISTORICALLY, THEY HAD NO PROBATIVE VALUE. A FEW YEARS AGO, OF COURSE, WE SEE IN THE RESQNET CASE A SLIGHT CRACKING OF THE DOOR WITH REGARD TO SETTLEMENT AGREEMENTS.

BUT POST-RESQNET, WE HAVE THE COURT, IN CASES SUCH AS LASERDYNAMICS, REALLY SERVING A REMINDER AT HOW NARROWLY THAT DOOR WAS OPENED IN RESQNET, OKAY, REITERATING THE LONGSTANDING DISAPPROVAL OF RELYING ON SETTLEMENT AGREEMENTS BECAUSE THEY REALLY FUNDAMENTALLY DO NOT REFLECT THE CONDUCT OF PEOPLE IN A HYPOTHETICAL NEGOTIATION, WHICH SORT OF ASSUMES THERE IS NO

LITIGATION AND ALL OF THE PRESSURES AND BURDENS AND COSTS AND UNCERTAINTIES OF LITIGATION SIMPLY AREN'T PART OF THAT CONVERSATION IN THE CLASSICAL SENSE.

AND THE SUPREME COURT, GOING BACK A HUNDRED YEARS, HAS OBSERVED THAT SORT OF RELATIVELY SELF-EVIDENT NOTION.

AND SO, AGAIN, WHAT WE SEE IS A LIMITED CIRCUMSTANTIAL EXCEPTION TO THAT BASED ON RULE OF INADMISSIBILITY.

AND RESQNET -- JUST TO POPULATE THIS WITH SOME EXAMPLES, IN RESQNET, IT WAS A PRIOR SETTLEMENT INVOLVING THE PATENT-IN-SUIT THAT THE PATENT OWNER HAD GRANTED. OKAY?

IN A WAY, I COULD SORT OF CATEGORIZE THAT AS EFFECTIVELY AN ADMISSION AGAINST INTEREST. I MEAN, HEY, IF AN ACCUSED INFRINGER WANTS TO LOOK TO A SETTLEMENT AGREEMENT, WELL, MAYBE THERE ARE SOME POLICY REASONS WHY THAT MAKES SENSE.

I WOULD ALSO NOTE --

THE COURT: WELL, I HAVE TO NOTE, FROM MY OTHER -- IN ONE OF MY OTHER CAPACITIES HERE, THAT THAT LOSS, WHICH I KIND OF AGREE WITH, DOESN'T MAKE THE SETTLEMENT JUDGE'S JOB ANY EASIER OF PERSUADING PATENT OWNERS TO TAKE REASONABLE OFFERS.

MR. GLITZENSTEIN: WELL, EXACTLY. AND I THINK THAT IS ONE OF THE VERY POWERFUL POLICY CONSIDERATIONS THAT UNDERLIES THE RELUCTANCE.

AS WE PUT IN OUR PAPERS, YOU KNOW, MICROSOFT IS NO STRANGER, UNFORTUNATELY, TO PATENT LITIGATION, AND I WOULD IMAGINE NO COURT WANTS TO DISCOURAGE A PARTY IN MICROSOFT'S

POSTURE TO SIT DOWN AND TRY TO SETTLE A LAWSUIT.

BUT, YET, THE INCREASING OPENING, OR THE EFFORTS OF PLAINTIFFS TO INCREASINGLY OPEN THE DOOR THAT WAS JUST CRACKED EVER SO SLIGHTLY IN RESQNET WILL HAVE THAT CONSEQUENCE. IT'S INEVITABLE. PEOPLE WILL HAVE TO START CONSIDERING THE RIPPLE EFFECTS OF ANY SETTLEMENT THEY ENTER INTO, I WOULD SUBMIT, AS A MATTER OF POLICY, AND JUST AS A MATTER OF ITS LACK OF PROBATIVE VALUE ON WHAT PARTIES WOULD EVER SIT DOWN TO.

GPNE, I KNOW THIS WAS A CASE THAT WAS DISCUSSED IN THE BRIEFING, YOU KNOW, THAT, TOO, I THINK HAD SOME VERY, VERY SPECIAL FACTUAL CIRCUMSTANCES. ONE THAT THE COURT, I THINK, IDENTIFIED AND PLACED GREAT SIGNIFICANCE ON WAS THE FACT THAT GPNE WAS A LICENSING COMPANY. THAT WAS ITS BUSINESS.

I THINK AT LEAST SOME OF THOSE SETTLEMENTS INVOLVED ALSO THE PATENTS-IN-SUIT, MAKING IT SIMILAR TO A RESQNET TYPE SITUATION. I DON'T KNOW BECAUSE THE PUBLIC RECORD ON THAT IS REDACTED.

THE COURT: I ACTUALLY KNOW THAT RECORD FAIRLY WELL, AND -- WELL, I'LL LEAVE IT AT THAT.

MR. GLITZENSTEIN: I THINK THERE ARE SOME PEOPLE IN THE COURT WHO ARE MORE FAMILIAR WITH IT THAN I AM, YOUR HONOR.

MR. BHATIA: SOMEONE WHO'S COMING UP.

(LAUGHTER.)

MR. GLITZENSTEIN: SO, YOUR HONOR, WE GET, THOUGH, TO REALLY WHERE THE CRITICAL ISSUE RESTS WITH REGARD TO THE LUCENT

CASE, AND THAT'S THIS ISSUE OF THE JMOL DECISION FROM THAT CASE.

WE'VE LOOKED, I WOULD IMAGINE SENTIUS HAS LOOKED AS WELL, FOR AUTHORITY AND WE HAVEN'T SEEN ANY AUTHORITY, AND BY "AUTHORITY" I MEAN ACADEMIC RESEARCH, FOR EXAMPLE. I KNOW THAT CAN BE OF SOME INTEREST FOR REALLY WHAT IS AN ISSUE OF TRYING TO OPEN THIS DOOR THAT THE FEDERAL CIRCUIT CRACKED EVER SO SLIGHTLY IN RESQNET WIDE OPEN.

THE COURT: SO THE WAY I -- WHEN I WAS READING YOUR PAPERS ON THIS, THE WAY I STARTED TO THINK ABOUT THIS WAS EFFECTIVELY WHAT MILLS IS OPINING IS THAT IN THIS HYPOTHETICAL NEGOTIATION, THE PARTIES COULD HAVE CONSIDERED A HYPOTHETICAL NEGOTIATION. I MEAN, THAT, AFTER ALL, IS WHAT THE JMOL ADDRESSED, RIGHT? SO WE'RE NOW TWO STEPS REMOVED FROM AN ACTUAL NEGOTIATION.

MR. GLITZENSTEIN: MAYBE THREE, YOUR HONOR.

I'M GOING TO SKIP AHEAD HERE TO SLIDE 5.

SO IT WASN'T EVEN A CONSIDERATION OF A HYPOTHETICAL NEGOTIATION. IT WAS THE SUFFICIENCY OF THE EVIDENCE PRESENTED AT TRIAL TO REFLECT WHAT WOULD HAVE HAPPENED IN A HYPOTHETICAL NEGOTIATION BETWEEN MICROSOFT AND LUCENT.

AND HERE'S THE -- HERE'S ONE OF THE KICKERS, YOUR HONOR. IT'S A HYPOTHETICAL NEGOTIATION THAT PREDATED THIS ONE BY 13 YEARS. OKAY? THIS IS IN 837 F.SUPP.2D 1107, 1115.

HE WAS -- MR. SIMS IN THAT CASE WAS ACTUALLY OPINING ON

WHAT WOULD HAVE HAPPENED HYPOTHETICALLY IN 1996 WITH REGARD TO A NEGOTIATION BETWEEN LUCENT -- MAJOR COMPANY, BIG PORTFOLIO -- AND MICROSOFT -- MAJOR COMPANY -- AND THEY ARE SORT OF CRITICALLY URGING THAT THAT ANALYSIS HAS PROBATIVE VALUE ON WHAT MICROSOFT AND SENTIUS WOULD HAVE AGREED TO IN 2009.

NOW, I'VE IDENTIFIED A COUPLE OF CASES HERE. I MEAN, THE FEDERAL CIRCUIT, JUST ON THIS VERY ISSUE OF THE LAPSE OF TIME, OR THE PASSAGE OF TIME, HAS BEEN CRITICAL. I MEAN, IF THIS WERE, IN FACT, A LICENSE BETWEEN MICROSOFT AND LUCENT, THEY WOULD ALL -- AN ARM'S LENGTH TRANSACTION, SO, YOU KNOW, SORT OF THE FAR END OF THE SPECTRUM THAT I HAD INDICATED IN MY FIRST SLIDE, THEY WOULD STILL FACE PROBLEMS. IT'S JUST TOO EARLY TO BE PROBATIVE.

BUT THEN WHEN YOU LAYER ON TOP OF IT REALLY ALL OF THE PROCEDURE THAT REALLY LED TO THE NUMBER THAT ULTIMATELY MR. MILLS BASES HIS ANALYSIS ON, IT IS -- IT IS AN ATTENUATION UPON ATTENUATION UPON ATTENUATION.

SO AGAIN, YOU KNOW, FROM OUR PERSPECTIVE, PROCEDURALLY IT'S FUNDAMENTALLY DIFFERENT. THE TECHNOLOGY IS DIFFERENT. THE ECONOMIC CIRCUMSTANCES ARE DIFFERENT. THE TIMING, THE CHRONOLOGY IS FUNDAMENTALLY DIFFERENT.

AND TO THE -- TO SORT OF RETURN THE CONVERSATION TO FIRST PRINCIPLES, YOU SAY, WELL, WHY WOULD ANYBODY LOOK TO THIS?

AND THEY HAVE NOT IDENTIFIED -- AND THIS IS SORT OF ANOTHER ISSUE WITH REGARD TO DAUBERT. I MEAN, IT IS THEIR

OBLIGATION TO SUPPORT THE PROBATIVE VALUE OF THIS, AND THEY HAVE NOT IDENTIFIED ANY SORT OF REAL WORLD CIRCUMSTANCE ANYWHERE WHERE ANY BUSINESS PERSON, OR PAIR OF BUSINESS PEOPLE TRYING TO NEGOTIATE A RESOLUTION OR A LICENSE, WOULD LOOK TO SUCH ATTENUATED INFORMATION AND SAY, YES, THAT ACTUALLY IS MATERIAL TO OUR DISCUSSION.

THE COURT: SO WHAT YOU'RE SAYING AS WELL, RIGHT, IS THAT WHEN I RULE ON JMOLS AFTER JURY TRIALS, AS I TEND TO DO FROM TIME TO TIME, NO ACTUAL LICENSE NEGOTIATOR OUT THERE IS STUDYING MY OPINIONS TO INFORM A LICENSE THAT MAY BE UNDER ACTUAL CONSIDERATION?

MR. GLITZENSTEIN: I WOULD SUBMIT, YOUR HONOR, THOSE WOULD BE REVIEWED FOR ALL SORTS OF REASONS WITH GREAT INTEREST BY PEOPLE, BUT NOT FOR THAT.

THE COURT: PUT ANOTHER WAY, NOBODY CARES.

(LAUGHTER.)

MR. GLITZENSTEIN: NOT FOR THAT ISSUE, YOUR HONOR, NO, NO.

THIS IS JUST SOMETHING THAT -- I MEAN, I HAVEN'T SEEN THIS IN ANOTHER CASE. AGAIN, WE'VE LOOKED FOR CASES THAT WOULD HAVE DEALT WITH THIS ISSUE.

AND JUST TO -- JUST TO MAKE SURE THAT THERE'S -- I MEAN, IN THE BRIEFING THERE WAS SOME DISCUSSION THAT WE WERE PERHAPS TWO SHIPS PASSING IN THE NIGHT, WHERE OUR MOVING PAPERS, OF COURSE, REALLY DID FEATURE THIS AS A MARQUEE ISSUE AND THEY

CAME BACK AND SAID, WELL, NO, NO, IT'S THE SETTLEMENT AGREEMENT THAT FOLLOWED THIS.

WELL, WHAT HAPPENED PROCEDURALLY WAS JUDGE HUFF ENTERED HER JMOL ORDER. LUCENT THEN APPEALED AND THE CASE SETTLED WHILE LUCENT'S APPEAL WAS PENDING.

THE COURT: THAT'S RIGHT. THE FEDERAL CIRCUIT NEVER ACTUALLY ISSUED AN OPINION; RIGHT?

MR. GLITZENSTEIN: THAT'S CORRECT. SO A LOT OF THINGS LIKE, FOR EXAMPLE, THE DAMAGES MODEL THAT MR. SIMS OFFERED UP IN THAT CASE, WHICH IS ACTUALLY SORT OF A SIMILAR INCOME APPROACH TO WHAT THEIR ALTERNATIVE THEORY IS HERE, HAS JUST NEVER BEEN PASSED ON.

BUT I THINK IT'S SAFE TO SAY -- I MEAN, SLIDE 3 IS TAKEN DIRECTLY FROM MR. MILLS' REPORT. HIS ANALYSIS REALLY DOES -- YOU KNOW, IT STARTS HERE WITH THIS $26.3 MILLION THAT JUDGE HUFF DECIDED THAT THE EVIDENCE WOULD SUPPORT IN THAT CASE.

HE ALLOCATES THAT NUMBER DOWN TO A $24.6 MILLION FIGURE FOR OUTLOOK, AND THEN DIVIDES IT, AND THEN HE COMES UP WITH HIS MAGIC 22 CENTS PER -- WHAT HE APPLIES AS BEING 22 CENTS PER FEATURE, PER SOFTWARE PROGRAM.

SO IF YOU HAVE BOTH FEATURES IN WORD --

THE COURT: IT DOUBLES UP.

MR. GLITZENSTEIN: -- IT'S 44 CENTS. EXACTLY.

BUT THAT 22 CENTS, THAT JUST SCALES UP AND HE JUST DOES A

SORT OF SIMPLE COUNT BASED ON WHETHER THE FEATURES, BOTH FEATURES ARE PRESENT OR NOT.

SO THE TOTAL SUM FOR A FULLY FEATURED OFFICE SUITE IS SEVEN TIMES 22 CENTS, OR $1.54.

AND JUST SO I WASN'T CONFUSED ON THIS, I ASKED HIM AT HIS DEPOSITION, AND I THINK HIS ANSWER COULD NOT HAVE BEEN CLEARER THAT, YES, HE STARTED WITH THE JUDGE'S FIGURE AND DIVIDED IT AND THAT'S WHAT HE DID, HE CAME UP WITH HIS NUMBER.

THERE IS SOME -- THERE IS A MINOR AMOUNT OF DISCUSSION IN HIS REPORT, WE PUT THIS IN OUR REPLY BRIEF, AND THE ACTUAL SETTLEMENT AMOUNT WITH LUCENT IS CONFIDENTIAL, SO I WON'T REPEAT IT HERE IN OPEN COURT.

BUT THERE ARE TWO INSTANCES IN HIS REPORT WHERE HE ACTUALLY EVEN MENTIONS THAT NUMBER, BUT THERE IS NO ANALYSIS ON THE BASIS OF THAT NUMBER.

SO FOR ALL OF THESE REASONS, YOUR HONOR, WE SUBMIT THAT -- I MEAN, JUST SIMPLY ON ITS RELEVANCE GROUNDS, IT JUST DOESN'T MEASURE UP, I MEAN, REALLY AT ANY LEVEL.

AND ALTHOUGH IT'S AT THE BOTTOM OF THE SLIDE, I DIDN'T WANT TO GIVE IT SECOND, OR SHORT SHRIFT, IT'S ALSO PLAINLY UNFAIRLY PREJUDICIAL, AND THE NOTION THAT WE WOULD BE CONFRONTED WITH THE TASK OF HAVING TO EXPLAIN TO THE JURY -- I MEAN, THIS WAS A CASE THAT SPANNED TEN YEARS OF TIME. ONE JURY AWARDED $357 MILLION. IT WENT UP ON APPEAL TO THE FEDERAL CIRCUIT. THEY SAID THAT'S TOO MUCH. IT COMES BACK DOWN, GETS

RETRIED TO ANOTHER JURY FOR $70 MILLION.

I MEAN, WHERE DOES THIS END IN TERMS OF THE RESPONSIVE EVIDENCE THAT WE WOULD NEED TO PUT ON IN ORDER TO PUT THIS INTO PERSPECTIVE, AND REALLY WHAT IS A JURY ULTIMATELY GOING TO MAKE OF THIS ANYWAY?

AND WE SUBMIT THAT THIS REALLY WILL BE NOTHING MORE THAN ESSENTIALLY ASKING JURORS TO IGNORE THE EVIDENCE IN THIS CASE AND ANY EVIDENCE OF WHAT THIS PATENT IS, IN FACT, WORTH ON ITS OWN TERMS AND SUBSTITUTE, FOR THAT JUDGMENT, A JUDICIAL DECISION WITH ALL OF THESE DIFFERENT CONSIDERATIONS.

I'LL BE BRIEF ON ARENDI. WE TOUCHED ON THIS OUR PAPERS. AGAIN, THE SETTLEMENT AMOUNT AND THE PARTICULAR TERMS ARE CONFIDENTIAL, SO I'LL BE A LITTLE BIT HIGH LEVEL ON THIS ONE, BUT THE BOTTOM LINE IS IT INCLUDED THINGS OTHER THAN THE PATENT-IN-SUIT, AND MR. MILLS DIDN'T ACCOUNT FOR THAT.

HE PLACES MUCH LESS SORT OF EMPHASIS IN HIS ANALYSIS ON ARENDI. THAT IS WHAT HE RELIES ON AS HIS, SORT OF HIS PREDICATE, HIS FOUNDATIONAL PREDICATE FOR THE SMART TAGS FEATURE.

ALL RIGHT. THERE'S A SECOND ISSUE, TOO, THAT I WANT TO SORT OF CONFRONT WITH REGARD TO MR. MILLS AND THE LUCENT JMOL, AND THAT IS HIS ARGUMENT IS FUNDAMENTALLY CIRCULAR. HE STARTS -- HE HAS WHAT HE SAYS ARE TWO DIFFERENT THEORIES OF PATENT DAMAGES. ONE IS THE ONE I'VE JUST GONE THROUGH WHERE HE TAKES THE LUCENT ORDER AND GETS 22 CENTS AND THEN APPLIES IT AS

I'VE SAID.

THE SECOND IS HIS SO-CALLED INCOME APPROACH, WHICH IS WHAT HE SAYS IS SORT OF BASED ON THE SALES THAT HE CONTENDS MICROSOFT WOULD HAVE LOST IF IT LACKED THESE PARTICULAR BACKGROUND SPELL AND GRAMMAR CHECK FEATURES.

MY POINT ABOUT CIRCULARITY THOUGH, YOUR HONOR, IS THIS: LUCENT WAS AN INCOME-BASED APPROACH. IT USED A SURVEY AND IT TRIED TO FIGURE OUT THE SORT OF SALES THAT MICROSOFT WOULD HAVE LOST, AND THEN IT SORT OF COMES UP WITH A BARGAINING HYPOTHETICAL AND SAYS, WELL, LUCENT AND MICROSOFT WOULD HAVE SHARED IT IN THAT WAY.

IT WAS NOT EVER A RUNNING ROYALTY CASE. BUT WHAT MR. MILLS DOES IS HE TAKES THAT LUMP SUM FIGURE ARRIVED AT BY LOST PROFITS, I'M SORRY, INCOME APPROACH THEY CALL IT, HE GETS HIS NUMBER, AND THEN HE TURNS AROUND AND HE STARTS WITH THAT SAME NUMBER AND HE DOES AN INCOME APPROACH AND SAYS, WELL, THE INCOME APPROACH MATCHES UP AND SO I'VE VALIDATED IT.

WELL, THAT IS CIRCULAR. I MEAN, HE'S STARTING WITH THE NUMBER THAT WAS BASED ON AN INCOME APPROACH, CONVERTING IT INTO A RUNNING ROYALTY, AND THEN USING AN INCOME APPROACH PURPORTEDLY TO CONFIRM WHAT HE STARTED OUT WITH. AND IT REALLY DOES ULTIMATELY COLLAPSE ON ITSELF ANALYTICALLY.

SO, AGAIN, THE KEY POINT IS THIS IS NOT A CASE WHERE THERE'S ANY QUESTION ABOUT THE NUMBER THAT HE STARTS WITH. I MEAN, I COULD -- I COULD ENVISION A CIRCUMSTANCE WHERE A

LICENSE AGREEMENT IS SILENT ON WHERE THE BOTTOM LINE NUMBER COMES FROM. WAS IT, YOU KNOW, THE PARTIES SITTING DOWN AND HASHING OUT THAT NUMBER AFTER LOOKING AT SALES REVENUE AND FORECASTS?

WE -- THERE'S NO MYSTERY WITH REGARD TO THE LUCENT JMOL. LUCENT ONLY ASKED FOR A LUMP SUM. JUDGE HUFF ACKNOWLEDGED THAT. SHE HAS A NICE DISCUSSION OF THE DIFFERENCES BETWEEN LUMP SUMS AND RUNNING ROYALTY.

THAT WAS SOMETHING THAT SHE WAS REFLECTING, AT LEAST IN PART, FROM THE FEDERAL CIRCUIT. THE QUOTES THAT I HAVE HERE ON SLIDE 7 ARE ALL THE SIGNIFICANT DIFFERENCES THAT THE FEDERAL CIRCUIT HAS IDENTIFIED WITH REGARD TO DIFFERENCES BETWEEN A RUNNING ROYALTY AND A LUMP SUM LICENSE.

AND THEY'RE SORT OF SELF-EVIDENT. I MEAN, A PATENT HOLDER MAY TAKE LESS TO RAISE CASH QUICKLY. THE LICENSEE MAY WANT TO CAP ITS LIABILITY. THAT MAKES SENSE IF YOU SELL A LOT OF PRODUCTS. YOU KNOW, THE TECH -- YOU'RE SORT OF GAMBLING. THE TECHNOLOGY MAY BE WILDLY SUCCESSFUL, OR MAYBE THE TECHNOLOGY WINDS UP BEING WORTHLESS.

WELL, IF YOU CONSIDER ALL OF THESE HYPOTHETICALS -- SORRY. ALL OF THESE SORT OF REAL WORLD CONSIDERATIONS FOR WHY PEOPLE MIGHT FAVOR A LUMP SUM AGREEMENT, NOTHING -- IN EACH ONE OF THESE SITUATIONS, IT WOULD BE MEANINGLESS TO TAKE THE LUMP SUM FIGURE AND SORT OF, ON A POST HOC BASIS, DIVIDE IT BY THE NUMBER OF UNITS THAT WERE COVERED BY THE LICENSE AND SAY I NOW

HAVE A RUNNING ROYALTY, BECAUSE RUNNING ROYALTY NEVER ENTERED INTO THE MINDSET OF THE PEOPLE WHO ENTERED THE AGREEMENT.

SO IF THE -- IF THE FEDERAL CIRCUIT IS WILLING TO ENTERTAIN THE ADMISSIBILITY OF LICENSE AGREEMENTS WHERE THEY'RE SUFFICIENTLY, TECHNICALLY, AND ECONOMICALLY COMPARABLE, THAT'S ONLY BECAUSE THEY ARE PERCEIVED TO BE A REFLECTION OF SORT OF WHAT THE MARKET VALUE IS FOR THIS PARTICULAR TECHNOLOGY.

SO IT MAKES NO SENSE TO SAY, WELL, IT HAS A LUMP SUM MARKET VALUE, I'M NOW GOING TO CONVERT THAT TO A RUNNING ROYALTY BASIS BECAUSE, AGAIN, IT DOESN'T INDICATE AT ALL -- OR I'M SORRY. IT DOESN'T REFLECT THE ACTUAL MINDSET OF THE PARTIES TO THE HYPOTHETICAL NEGOTIATION.

SO, AGAIN, IF YOU RETURN TO FIRST PRINCIPLES AND YOU SAY -- I'M SURE THERE ARE LICENSORS OUT THERE THAT SAY, LOOK, IF YOU WANT A LICENSE TO MY TECHNOLOGY, IT'S A MILLION DOLLARS. I REALLY DON'T CARE WHAT YOU'RE DOING OR WHO YOU ARE. I'M WRITING LICENSES.

IT WOULD BE MEANINGLESS FOR THE PARTIES IN THE HYPOTHETICAL NEGOTIATION, UNDER THE FIRST PRINCIPLE'S, YOU KNOW, ANALYSIS, IT WOULD BE MEANINGLESS FOR THEM TO SAY, WELL, YOU KNOW, I'M GOING TO LOOK AT THAT LICENSE AND I'M GOING TO PAY MORE OR LESS BASED ON MY LEVEL OF ANTICIPATED UNIT SALES, BECAUSE THAT'S A LICENSE WHERE THE LICENSOR SIMPLY DOESN'T CARE ABOUT THE NUMBER OF UNIT SALES, DOESN'T WANT TO BE BOTHERED WITH THE ACCOUNTING, DOESN'T WANT THE RISK THAT THIS LICENSEE

IS GOING TO COME UP SHORT, AND DOESN'T PARTICULARLY CARE IF THIS LICENSEE DOES REALLY WELL IN HIS SALES.

SO THE --

THE COURT: I'M SORRY FOR INTERRUPTING YOU. SO IF YOU PUT ASIDE THE JMOL NATURE OF THIS, OR SOURCE OF THIS INSIGHT AND FOCUS EXCLUSIVELY ON THE IDEA OF CONVERTING A LUMP SUM INTO A RUNNING ROYALTY, ARE THERE NO CIRCUMSTANCES IN WHICH A LUMP SUM AGREEMENT COULD NOT BE PROPERLY ANALYZED FOR PURPOSES OF CALCULATING A REASONABLE ROYALTY?

MR. GLITZENSTEIN: I THINK THERE ARE CIRCUMSTANCES WHERE IT COULD BE DONE. I THINK YOU'D NEED THE DISCOVERY, FRANKLY, AS TO, YOU KNOW, WHETHER THE PARTIES ACTUALLY THOUGHT ABOUT, YOU KNOW, VOLUME WHEN THEY CAME UP WITH THE PRICE TERM.

THE COURT: SO PERHAPS ONE WAY TO FILL THAT GAP, THEN, WOULD HAVE BEEN FOR MILLS TO HAVE LOOKED AT THESE CRITERIA LAID OUT BY -- I THINK THE FEDERAL CIRCUIT GETS FIRST CREDIT. JUDGE HUFF, TO HER CREDIT, TOOK MANY OF THESE POINTS FROM THAT OPINION IF I REMEMBER THAT SEQUENCE IN MY OWN MIND.

MR. LAMBERSON: UM-HUM.

THE COURT: SO IT WOULD SEEM THAT WHAT YOU'RE SUGGESTING HERE IS, AT A MINIMUM, THE EXPERT SHOULD HAVE PRESENTED EVIDENCE OR IDENTIFIED EVIDENCE TO SUGGEST THAT ONE OR MORE OF THESE FACTORS WOULD APPLY IN THIS SITUATION.

MR. GLITZENSTEIN: RIGHT. OR PERHAPS THAT THE -- THAT THIS WAS THE CIRCUMSTANCE WHERE A LUMP SUM WAS AGREED

TO --

THE COURT: RIGHT.

MR. GLITZENSTEIN: -- BECAUSE THE PARTIES SAID, LET'S BE VERY SOPHISTICATED ABOUT IT, LET'S DO A NET PRESENT VALUE CALCULATION, WE LOOK AT YOUR HISTORICAL AND YOUR FUTURE SALES AND COME UP WITH A NUMBER.

IF THERE WERE DISCOVERY THAT WOULD INDICATE THAT THE PARTIES TO THIS ARM'S LENGTH TRANSACTION --

THE COURT: OR EVEN PARTIES LIKE THEM IN SIMILAR SITUATIONS PERHAPS, RIGHT?

MR. GLITZENSTEIN: I -- I MEAN, THESE LICENSES ARE ALWAYS SO FACT AND CONTEXT SPECIFIC. I WOULD THINK IN THE FIRST INSTANCE YOU'D WANT TO KNOW, YOU KNOW, WHAT THE PARTIES HERE THOUGHT.

AGAIN, THE -- SORT OF THE HEADLINE FOR THIS ISSUE, THOUGH, IS WE DON'T HAVE TO GUESS. WE DON'T HAVE TO SPECULATE. SENTIUS DIDN'T HAVE TO TAKE ANY DEPOSITIONS OF MICROSOFT OR LUCENT TO FIGURE THIS ONE OUT. I MEAN, IT'S ABOUT AS --

THE COURT: IT'S IN THE OPINIONS.

MR. GLITZENSTEIN: IT'S SORT OF AS LAID OUT AS IT COULD BE.

AND AGAIN, MR. SIMS WAS ONLY ASKING FOR A LUMP SUM. WE KNOW WHAT HIS THEORY WAS. WE KNOW WHAT DATA HE WAS RELYING ON.

SO, AGAIN, THIS IS ONE WHERE IT'S NOT HARD. I MEAN, SOME LICENSE AGREEMENTS, MAYBE IT'S HARDER THAN OTHERS TO SORT OF

UNPACK IT. THIS IS NOT ONE OF THEM.

SO, YOU KNOW, THERE JUST IS NO BASIS AT ALL TO, YOU KNOW, PARTICULARLY WHERE WE KNOW IT WAS NOT A RUNNING ROYALTY AGREEMENT, TO TURN IT AROUND AND TURN IT INTO -- TURN IT INTO ONE.

ALL RIGHT. I'LL -- I'LL MOVE PAST THIS ISSUE. THIS IS JUST AN ISSUE OF THE TECHNICAL COMPARABILITY, BUT I'M FINE TO LEAVE THAT TO THE BRIEFING. I THINK IT'S BEEN WELL DEVELOPED BY BOTH SIDES.

ALL RIGHT. THIS IS SOMETHING, THOUGH, THAT I WANTED TO TURN TO NEXT, AND THAT'S MR. MILLS' INCOME APPROACH, AND REALLY THREE POINTS, AND THERE THEY ARE.

IT'S DERIVATIVE OF THE LUCENT JMOL THEORY. I MEAN, I KNOW THIS, TOO, IS AN AREA THAT MAY STRIKE THE COURT AS US BEING TWO SHIPS PASSING IN THE NIGHT, BUT I THINK IT'S IMPORTANT TO ACTUALLY LOOK AT HOW THIS ISSUE WAS TEED UP BY MR. MILLS TO SEE EXACTLY WHY IT'S NOT A TRULY INDEPENDENT BASIS. IT IS A CHECK AT BEST.

AND THAT'S KEY BECAUSE, OF COURSE, IF THE LUCENT JMOL THEORY COMES OUT, THIS GOES WITH IT. THAT'S SORT OF THE PUNCH LINE, I THINK, FOR WHY I MAKE THIS POINT FIRST, THAT IT'S ENTIRELY DERIVATIVE.

AND THAT'S IMPORTANT BECAUSE OF THIS SECOND BULLET. THE -- THE ULTIMATE SPLIT THAT HE COMES UP WITH IS NOT THE PRODUCT OF SORT OF WEIGHING SOME QUANTITATIVE EVIDENCE AND

SAYING I THINK THAT 22/78 PERCENT IS THE CORRECT SPLIT.

THAT REALLY WAS BACKED INTO AS A WAY TO SAY, WELL, MY 22 CENTS PER FEATURE, PER PROGRAM ROYALTY IS SOUND BECAUSE WHEN I APPLY THIS CHECK APPROACH, IT KIND OF COMES OUT TO LOOK REASONABLE.

BUT IT WASN'T AN INDEPENDENTLY DERIVED NUMBER.

AND THEN, FUNDAMENTALLY, IT'S REALLY A DISGUISED ENTIRE MARKET VALUE RULE THEORY, WHICH I THINK IS REALLY YET ANOTHER CRITICAL FLAW WITH THIS SO-CALLED INCOME APPROACH.

THIS WAS SOMETHING THAT WAS NEVER TESTED WITH REGARD TO MR. SIMS' THEORY. IT WAS NEVER TESTED ON APPEAL. I THINK THERE ARE SOME, SOME VERY SERIOUS DEFECTS WITH REGARD TO HIS ATTEMPT TO APPLY THE ENTIRE MARKET VALUE RULE, ESSENTIALLY TO TAKE FULL CREDIT FOR MICROSOFT'S REVENUE.

SO HERE'S -- HERE IS SORT OF THE KEY PARAGRAPH OF MR. MILLS' REPORT ON SLIDE 11, PARAGRAPH 181.

AND HE STARTS OUT HIS ANALYSIS WITH HIS, SORT OF HIS BOTTOM LINE BASED ON THE LUCENT JMOL THEORY OF 44 CENTS PER PRODUCT THAT HAS BOTH OF THOSE FEATURES.

AND THEN HE SAYS, WELL, WHEN I APPLY THAT AGAINST MY, WHAT HE CALLS HIS AT-RISK PROFIT ON A PER UNIT BASIS, I GET 22 PERCENT. OKAY?

BUT NOTE WHAT HE'S STARTING WITH, IT'S THE LUCENT-BASED BOTTOM LINE, AND THEN HE'S JUST APPLYING IT TO A NUMBER THAT HE GETS FROM THE WECKER SURVEY TO COME UP WITH THE 22 PERCENT.

IT IS -- AND THEN HE SAYS, WELL, SURE, GIVEN THE BARGAINING STRENGTHS DISCUSSED ABOVE, I HAVE CONCLUDED THIS IS A CONSERVATIVE OUTCOME.

AND HE SAYS, BOY, ACTUALLY, SENTIUS AND MICROSOFT, THEY PROBABLY WOULD HAVE DIVVIED UP THE PROFITS THERE BY 22 PERCENT, AND PERHAPS AS MUCH AS 50 PERCENT.

NOW, THAT'S AN ENORMOUS RANGE. I MEAN, THAT'S HUNDREDS OF MILLIONS OF DOLLARS.

AND, YET, HE CANNOT PUT A FINER POINT ON IT THAN THAT.

SO, AGAIN, JUST EVEN HIS ANALYSIS I THINK REVEALS HIS OWN LACK OF CONFIDENCE IN HIS ASSESSMENT OF THE PARTIES' RELATIVE BARGAINING POSITIONS.

AND HERE'S WHAT HE SAYS, OKAY? THIS IS A SUMMARY OF WHAT HE SAYS IN PARAGRAPHS 179 AND 80. I'VE TRIED TO JUST CAPTURE HERE SORT OF SHORTHANDS FOR WHAT HE SAYS, SORT OF HIS ASSESSMENT OF HOW THE PARTIES, SITTING ACROSS THE TABLE, WOULD HAVE BEEN SITUATED FROM A BARGAINING STRENGTH PERSPECTIVE.

PATENT VALID AND ENFORCEABLE. WELL, THAT'S ALWAYS THE ASSUMPTION. SO THAT'S A ZERO IMPACT.

SENTIUS IS A WILLING LICENSOR THAT DOES NOT COMMERCIALIZE, SO IT'S HAPPY TO ENTER INTO LICENSES. THAT'S ITS BUSINESS. FINE. THAT DIRECTIONALLY FAVORS MICROSOFT BECAUSE SENTIUS IS NOT TRYING TO MAINTAIN EXCLUSIVITY.

MICROSOFT RECEIVE BARE NONEXCLUSIVE PATENT LICENSE. AGAIN, THAT'S WHAT WE ASSUME IS THE RESULT OF THE HYPOTHETICAL, SO ZERO IMPACT.

ANALYSIS BASED ON OPERATING MARGIN, NOT INCREMENTAL MARGIN. SO OPERATING MARGIN IS LOWER. OKAY. SO DIRECTIONALLY THAT DOES FAVOR SENTIUS. I THINK THAT'S RIGHT.

MICROSOFT HAS CONTRIBUTED VALUE TO THE ACCUSED FUNCTIONALITY. WELL, THAT DIRECTIONALLY FAVORS MICROSOFT.

AND THEN THE EXTENT OF MICROSOFT'S USE, WELL, THEY'RE CLAIMING A ROYALTY ON A PER UNIT BASIS, SO THAT HAS NO IMPACT BECAUSE THEY CAN'T COUNT TWICE. THEY CAN'T PICK THAT UP IN THE ROYALTY RATE AND THE BASE.

SO THESE ARE THE SITUATIONAL OBSERVATIONS THAT MR. MILLS MAKES AND SAYS, AH-HAH, YOU KNOW, I THINK 22 PERCENT OR EVEN 50 PERCENT WOULD BE A FAIR SPLIT OF, YOU KNOW, THE LOST PROFIT VALUE THAT HE CALCULATED, AND I WOULD SUBMIT THAT NONE OF THIS SUPPORTS ANY LEVEL OF MATHEMATICAL PRECISION.

IT'S NOT CLEAR WHERE HE'S STARTING FROM. YOU KNOW, THIS HAS LOTS OF SORT OF ECHOS OF THE UNILOC -- I'M SORRY -- THE PRE-UNILOC USE OF THE 25 PERCENT RULE WHERE YOU SORT OF, YOU KNOW, HAVE -- YOU HAVE A STARTING POINT OF 25 PERCENT AND THEN YOU SORT OF HAVE AN UP ARROW AND A DOWN ARROW. IT JUST LEADS YOU TO NOWHERE ANALYTICALLY.

SO THE BOTTOM LINE IS THAT THIS NUMBER IS -- THIS IS NOT THE PRODUCT OF A REASONED OR PRINCIPLED METHODOLOGY AT ALL. IT IS A VERY MUCH ARBITRARY ASSESSMENT.

ALL RIGHT. THE ENTIRE MARKET VALUE RULE THEORY, WHY DO I

SAY IT'S A DISGUISED THEORY?

SO THE THEORY IS REALLY -- I TRIED TO SUMMARIZE IT MATHEMATICALLY HERE ON SLIDE 13. SO YOU HAVE THE WECKER SURVEY, ALL RIGHT, 11 PERCENT ALLEGEDLY WOULD NOT HAVE PURCHASED OFFICE IF IT LACKED BOTH THE BACKGROUND SPELL AND GRAMMAR CHECK FEATURES. OKAY?

SO THAT'S THE -- SO THAT FIRST BULLET POINT IS DR. WECKER, AND SO EVERYTHING BELOW IS MR. MILLS.

SO THE ALLEGED LOST PROFITS, HE TAKES THAT PERCENTAGE AND HE SAYS, WELL, REVENUE TIMES MARGIN. OKAY, MAKES SENSE, MATHEMATICALLY, ANYWAY. I'M GOING TO COME UP WITH A PER UNIT NUMBER, AND THIS NUMBER I SHOULD HAVE PUT DOWN HERE, HE SAYS IT'S 1.99. SENTIUS'S SHARE, OKAY, 22 PERCENT.

AND THAT'S SPECULATIVE AND NO SUPPORT FOR THAT, BUT THAT'S WHAT HE SAYS.

SO THE TOTAL PER UNIT IS 22 PERCENT OF THAT NUMBER, BUT THEN THE UNITS GO AWAY BECAUSE HE'S LOOKING FOR DAMAGES ON A PER UNIT BASIS, SO UNITS CANCEL OUT.

SO HIS TOTAL DAMAGES ARE 22 PERCENT TIMES 11 .2 PERCENT TIMES THE REVENUE TIMES THE MARGIN.

WELL, IF WE LOOK AT THAT, THAT'S 2 AND A HALF PERCENT OF MICROSOFT'S PROFIT ON THE ENTIRE OFFICE SUITE OF THE ENTIRE STANDALONE APPLICATION, SO IT'S A THEORY WHERE THE -- I MEAN, THE AMOUNT OF DAMAGES UNDER THIS THEORY IS DIRECTLY RELATED TO MICROSOFT'S REVENUE. IT'S CLEARLY AN ATTEMPT TO APPLY THE

ENTIRE MARKET VALUE RULE WHERE IT SIMPLY CANNOT BE APPLIED.

AND THERE'S NO DISPUTE ON THIS. I MEAN, I PUT THIS IN THE BRIEFING. I DIDN'T REPEAT IT IN THE SLIDE, BUT MR. MILLS, IN HIS DEPOSITION, I MEAN, HE VERY QUICKLY AGREED WITH ME THAT THIS CASE WAS NOT A CASE WHERE THE ENTIRE MARKET VALUE RULE WAS APPLICABLE AT ALL BECAUSE NO ONE IS SUGGESTING THAT THE BACKGROUND SPELL CHECK IS THE BASIS FOR THE DEMAND FOR THE PRODUCT.

THIS IS JUST REALLY A BACK DOOR WAY TO GET TO THE SAME RESULT. THE WAY I SORT OF ANALOGIZED IT IN THE REPLY BRIEF, I SAY, LOOK, IF HE'S BASICALLY SAYING, YOU KNOW, WE GET OUR DAMAGES BASED ON THE ENTIRE MARKET VALUE OF THE PRODUCT FOR THIS 11 PERCENT OF SALES, AND FOR THE REMAINING 89 PERCENT OF SALES, WE'RE HAPPY COLLECTING NONE.

THAT DOESN'T CHANGE THE -- EVEN THOUGH THEY'RE WILLING TO MAKE THAT CONSERVATIVE ASSUMPTION, IF YOU WILL, THAT DOESN'T CHANGE THE FUNDAMENTAL POINT THAT IT IS AN ENTIRE MARKET VALUE RULE THEORY AND, THUS, SHOULD BE STRICKEN UNDER DAUBERT ON THAT GROUND AS WELL.

ALL RIGHT. I'LL BE QUICK ON THIS. THE ASSERTED CLAIMS ARE ALL METHOD CLAIMS HERE.

I'M ON SLIDE 14. THIS HAS BEEN ADDRESSED. I ACTUALLY -- SORT OF ONE NEW THING ON SLIDE 14. THE CARDIAC PACEMAKERS --

THE COURT: EXCUSE ME FOR A SECOND. I APOLOGIZE.

(DISCUSSION OFF THE RECORD BETWEEN THE COURT AND THE

CLERK.)

THE COURT: GO AHEAD. I APOLOGIZE.

MR. GLITZENSTEIN: THANK YOU, YOUR HONOR.

SO THE CASE WE CITED IN OUR BRIEF WAS ACTUALLY THE DISTRICT COURT CASE. WE HAD INDICATED THAT IT WAS AFFIRMED BY THE FEDERAL CIRCUIT. I DID GO BACK AND LOOK AT THE FEDERAL CIRCUIT BRIEF, AND I PUT THE QUOTE HERE ON SLIDE 14, AND THEY'RE CLEAR AS DAY ON THIS. "CARDIAC CAN ONLY RECEIVE INFRINGEMENT DAMAGES ON THOSE DEVICES THAT ACTUALLY PERFORMED THE PATENTED METHOD DURING THE RELEVANT INFRINGEMENT PERIOD."

THIS IS SORT OF AN ACCOUNTING ISSUE, BUT IT'S AN IMPORTANT ONE, AND IT HAS A BIG IMPACT GIVEN THE BIG DOLLARS IN THIS CASE, BECAUSE MR. MILLS' ANALYSIS ASSUMES THAT EVERY PRODUCT IS, IN FACT, SOLD OR USED AND WE'VE SHOWN EVIDENCE THAT THAT'S NOT THE CASE.

THE COURT: I TAKE IT ON THIS POINT THAT MR. -- IS IT MR. WECKER OR DR. WECKER?

MR. GLITZENSTEIN: DR. WECKER.

THE COURT: IF DR. WECKER HAD INCLUDED IN HIS SURVEY SOME TYPE OF USE ANALYSIS, THAT MIGHT HAVE SOLVED THIS PROBLEM?

MR. GLITZENSTEIN: YOUR HONOR, IT WOULD HAVE. IN FACT, REMARKABLY ON THIS, THEY CITED -- FOR ONE OF THEIR SURVEY CASES, IT WAS A DISTRICT OF DELAWARE DECISION -- IT STARTS WITH AN M, IT ESCAPES MY MEMORY -- THAT WAS, IN FACT, A CASE WHERE THEY -- THAT WAS THE USE OF THAT SURVEY. IT WAS TO PROVE UP

THE INSTANCES OF DIRECT INFRINGEMENT BY THE END USERS. IT WAS ANOTHER CASE AGAINST APPLE, AND IT WAS, I THINK, PLAY LISTS FOR ITUNES OR SOMETHING LIKE THAT, AND IT WAS ACTUALLY ASKING ABOUT THE DIFFERENT STEPS IN THE METHOD CLAIMS.

SO, YES, THAT'S A GOOD ROLE FOR A SURVEY. AND HE HAD PEOPLE AND HE COULD HAVE ASKED THESE QUESTIONS ABOUT THE EXTENT OF THE USE OF THESE FEATURES.

AND BY THE WAY, I WOULD NOTE, AND HERE'S WHERE -- NOT TO GET TOO FAR AHEAD WITH DR. WECKER, BUT, YOU KNOW, HE WOULD HAVE HAD TO ASK THIS QUESTION FOR ALL FIVE OF THE PRODUCTS.

I MEAN, ONE OF THE THINGS THAT'S SORT OF INTERESTING HERE IS THERE'S A WHOLE SPAN OF PRODUCTS, INCLUDING ONE NOTE, WHICH IS NOT A HIGHLY USED PRODUCT AT ALL, AND I DON'T KNOW WHAT THE FREQUENCY OF USE OF SPELL CHECK IS, I DON'T THINK IT HAS GRAMMAR CHECK -- IT DOES NOT HAVE GRAMMAR CHECK -- SO I DON'T KNOW HOW FREQUENTLY SPELL CHECK IS USED AT ALL. THERE WAS JUST NO EFFORT BY SENTIUS TO TRY TO UNCOVER THAT IN THIS CASE.

ALL RIGHT. THE LAST POINT HERE I HAVE IS ON SLIDE 15. THESE ARE THINGS THAT I THINK WE'VE DEALT WITH IN THE BRIEF. THIS IS JUST SORT OF THE OVERALL -- SENTIUS'S EFFORTS TO HAVE MR. MILLS TALK TO THE JURY ABOUT THE OVERALL PROFITABILITY OF MICROSOFT OR OFFICE.

I MEAN, THIS IS SOMETHING THAT, AGAIN, YOU KNOW, IS SQUARELY ADDRESSED IN THE UNILOC DECISION. IT IS CLEARLY PREJUDICIAL. THERE'S REALLY NO PROBATIVE VALUE OF THE ACCUSED

FUNCTIONALITY.

THIS IS WHAT SENTIUS SAYS HERE. THEY SAY, WE NEED TO KNOW THE OVERALL PROFITABILITY TO DETERMINE THE IMPORTANCE OF OFFICE TO MICROSOFT AS A WHOLE, AND THAT IT'S RELEVANT TO SHOW THAT THE ACCUSED FUNCTIONALITY ARE IMPORTANT COMPONENTS.

WELL, I MEAN, I DON'T KNOW HOW YOU CAN SORT OF GET FROM GROSS MACRO LEVEL PROFITABILITY TO EITHER OF THOSE, YOU KNOW, SORT OF STATED GROUNDS FOR RELEVANCE.

BUT, I MEAN, PARTICULARLY TO THIS SECOND POINT, THEY HAVE -- AND MR. MILLS RELIES ON, YOU KNOW, A NUMBER OF INTERNAL MICROSOFT DOCUMENTS THAT TALK ABOUT THE FEATURES, AND WE WOULD SUBMIT THAT IF YOU'RE GOING TO TALK TO THE JURY ABOUT THE IMPORTANCE OF THE FEATURES AS PERCEIVED BY MICROSOFT, THAT'S A FAR, YOU KNOW, MORE DIRECT WAY TO DO IT THAT DOESN'T CREATE THE OBVIOUSLY PREJUDICE PROBLEMS FOR MICROSOFT.

AND THEN LASTLY, THEY SAY, WELL, IT'S PROBATIVE OF THE INCOME APPROACH, OR IT'S RELEVANT TO THE INCOME APPROACH.

WELL, THAT DOESN'T MEAN THEY HAVE TO TALK ABOUT THE MACRO LEVEL PROFITABILITY IN TERMS OF DOLLARS. THEY -- MR. MILLS -- AND ONE OF THE REASONS I PUT THE FORMULA ON THE PAGE EARLIER -- HE DOESN'T NEED TO SAY IT'S BILLIONS OF DOLLARS. HE NEEDS TO -- IF HE'S PERMITTED TO OFFER THAT INCOME APPROACH, AND WE SUBMIT HE SHOULDN'T BE, BUT IF HE'S PERMITTED TO DO THAT, HIS ANALYSIS REQUIRES -- RESTS ON MARGIN AND THE MARGINS ARE -- YOU KNOW, IT'S A MUCH LESS INFLAMMATORY FIGURE. YOU KNOW, A

PERCENTAGE --

THE COURT: THIS IS AN INTERESTING POINT. SO PERHAPS WHAT YOU'RE SUGGESTING IS THAT EVEN THOUGH, TO A PARTICULARLY SOPHISTICATED AUDIENCE, THE MARGIN NUMBERS MIGHT BE AS EYE OPENING OR AS SHOCKING AS THE AGGREGATE NUMBER, THE FACT OF THE MATTER IS, WHEN WE'RE DEALING WITH A JURY COMING FROM ALL ACROSS THE COMMUNITY, IT'S THE BIG NUMBER YOU'RE WORRIED ABOUT.

MR. GLITZENSTEIN: THAT'S RIGHT. AND I'VE SEEN IT -- I'VE SEEN THE BIG NUMBER ARGUED TO JURIES BEFORE.

THE COURT: I THINK YOU'RE CITING TO ONE CASE WHERE THAT WAS TRUE, RIGHT?

MR. GLITZENSTEIN: YES.

AND SO, AGAIN, I DON'T THINK THAT THAT -- YOU KNOW, THAT THAT PROVIDES THEM WITH THE RELEVANCE HOOK, EITHER. YES, THERE ARE SOME JURORS WHO COULD DO THE MATH THEMSELVES AND KIND OF FIGURE IT OUT.

THE COURT: THAT'S REALLY WHAT I'M GETTING AT. IT SEEMS TO ME EVEN IF I WERE TO AGREE WITH YOU ON THIS POINT, THERE CERTAINLY IS THE POSSIBILITY, MAYBE HERE IN SAN JOSE THE PROBABILITY, THAT ONE OR MORE OF MY JURORS WILL BE ABLE TO FIGURE THIS OUT IN ABOUT TWO SECONDS.

BUT I TAKE IT YOUR POINT IS THAT'S A BETTER -- THAT'S LESS PREJUDICE TO YOU, NOT NO PREJUDICE.

MR. GLITZENSTEIN: THAT'S CORRECT, YOUR HONOR. YOU KNOW, SEEING THE BIG NUMBER UP ON THE SCREEN, AS I'VE SEEN IT

FEATURED BEFORE, IS AN ISSUE.

NOW, AGAIN, I WANT TO UNDERSCORE, THIS IS ONLY RELEVANT, THOUGH, ON THE INCOME APPROACH, WHICH, YOU KNOW, WE'RE SUBMITTING REALLY SHOULDN'T GO TO THE JURY --

THE COURT: ANYWAY.

MR. GLITZENSTEIN: -- EITHER. SO IT SORT OF CURES THE PREJUDICE THAT WAY, TOO.

THE COURT: OKAY.

MR. GLITZENSTEIN: THANK YOU, YOUR HONOR.

THE COURT: THANK YOU. WHO'S GOING TO ARGUE THIS ONE?

MR. BHATIA: I WILL, YOUR HONOR.

THE COURT: MR. BHATIA, GO AHEAD.

MR. BHATIA: VINNIE BHATIA FOR SENTIUS.

YOUR HONOR, IT'S 4:00 O'CLOCK. I'M GOING TO TRY TO BE BRIEF. I DIDN'T BRING SLIDES. I HOPE THAT'S OKAY.

THE COURT: IT'S QUITE ALL RIGHT.

MR. BHATIA: ONE OF THE THINGS WE'RE DEALING WITH, I THINK LARGELY -- I LISTENED TO MICROSOFT'S ARGUMENT VERY CAREFULLY, AND I DO WANT TO POINT OUT THOUGH -- AND PLAINLY COUNSEL CAN ARGUE IN THAT WAY -- THAT MANY OF THE ARGUMENTS THEY RAISE, THEY RAISE FOR THE FIRST TIME, ARGUMENTS THAT ARE NOT EVEN IN THE BRIEFS.

LET'S TAKE A LOOK AT PAGE 5 OF THE SUBMISSION, LUCENT JMOL HAS NO PROBATIVE VALUE -- THIS IS FROM MICROSOFT'S

SUBMISSION -- AND THERE'S A BULLET, FIFTH BULLET DOWN REGARDING THE HYPOTHETICAL NEGOTIATION THAT PREDATED THE ONE IN THIS CASE BY 13 YEARS. THEY MAKE THIS KIND OF STALENESS ARGUMENT.

YOU CAN READ THEIR BRIEFS. YOU'VE READ THEIR BRIEFS. THAT'S NOT IN THE OPENING BRIEF. THAT'S NOT IN THE REPLY BRIEF.

THIS CASE, ODETICS, WHICH IS CITED IN THE THIRD INDENTION, YOU CAN LOOK AT THE TABLE OF AUTHORITIES. NOT EVEN IN THE TABLE OF AUTHORITIES. SO IT'S LIKE A SURPRISE ARGUMENT THAT THEY BRING AND MAKE.

BUT IF THEY REALLY THOUGHT THE ARGUMENT WAS PERSUASIVE TO YOU, IF IT WAS REALLY A DAUBERT ISSUE AS OPPOSED TO THE WEIGHT OF ADMISSIBILITY, I SUBMIT THEY WOULD HAVE MADE THE ARGUMENT IN THE OPENING BRIEF. THEY WOULD HAVE PUT IT OUT THERE AND SAID THIS IS A WINNER. THEY WOULDN'T WAIT TO SNEAK IT IN ON A SLIDE AT 3:45 IN THE AFTERNOON.

I WOULDN'T GIVE IT MUCH WEIGHT FOR THAT REASON ALONE. I WOULD FOCUS ON THE ARGUMENTS THEY DID MAKE IN THEIR BRIEFS.

THE SAME ARGUMENT CAN BE MADE ON THIS DISGUISED MARKET VALUE ANALYSIS. THAT'S NOT IN THE OPENING BRIEF. THAT APPEARS FOR THE FIRST TIME IN THE REPLY BRIEF BURIED AT THE VERY END, BECAUSE THEY KNOW AND UNDERSTAND THAT THIS IS NOT A DISGUISED MARKET AND -- THAT THE INCOME APPROACH IS NOT A DISGUISED MARKET VALUE ANALYSIS.

TAKE THEIR LOGIC. ANY TIME YOU USE AN INCOME APPROACH AND

YOU SAY THAT X PERCENT OF DEFENDANT'S SALES ARE AT RISK OR LOST, AND YOU THEN CALCULATE THE LOST PROFIT ON THOSE SALES, THAT -- BY DEFINITION, I CAN TAKE THOSE TWO NUMBERS AND THEN I CAN MULTIPLY IT BY ANOTHER NUMBER AND SAY THAT'S 2 AND A HALF PERCENT OF THE TOTAL, WHICH IS ALL WE DID.

SO, IN EFFECT, HE'S SAYING YOU CAN NEVER HAVE THE INCOME APPROACH BECAUSE THE INCOME APPROACH CALCULATES A SMALLER PERCENTAGE LOSS OF THE WHOLE, AND BECAUSE IT IS A, A SMALL PERCENTAGE OF THE WHOLE, RIGHT, I LOST PROFIT ON 10 PERCENT, WHICH MEANS I REALLY LOST 1 PERCENT OF 100 PERCENT, RIGHT, I STRETCH IT OUT, WELL, THAT'S A DISGUISED MARKET VALUE ANALYSIS.

THE COURT: THAT WOULD, I TAKE, IT, BE AS TRUE IF WE'RE TALKING ABOUT A 2 AND A HALF PERCENT ROYALTY AS IF WE WERE TALKING ABOUT 0.000 PERCENT.

MR. BHATIA: CORRECT. THE ARGUMENT IS A TOTAL STRAW MAN AND IT COLLAPSES ON ITSELF, BECAUSE YOU'RE ESSENTIALLY THEN READING THE INCOME APPROACH OUT OF THE LAW, WHICH IS NOT THE LAW, AND THEY WANT TO TALK AT LENGTH ABOUT FEDERAL CIRCUIT DECISIONS AND THE FEDERAL CIRCUIT DECISIONS SUPPORT THE INCOME APPROACH.

SO LET'S FOCUS LIKE A LASER ON THE ARGUMENTS THEY DO MAKE AND LET ME DEMONSTRATE WHY THOSE ARE NOT DAUBERT ARGUMENTS.

THEY MAKE TWO BASIC ARGUMENTS. FIRST -- AND BEFORE I GET TO THEM, LET ME JUST ESTABLISH THE BEDROCK THAT WE KNOW HAS NOT BEEN CHALLENGED, WHICH IS THE COMPARABILITY OF THESE LICENSES

ARE NOT AT ISSUE.

THE UNDERLYING TECHNOLOGY WAS TESTIFIED TO BY MADISETTI. THEY HAVE NOT CHALLENGED MADISETTI ON THIS POINT. THEY HAVE NOT SUBMITTED A COUNTER DECLARATION FROM THEIR EXPERT TO SUGGEST THAT THE TECHNOLOGY IN LUCENT, FOR EXAMPLE, IS NOT COMPARABLE TO THE TECHNOLOGY IN THIS CASE.

SO YOU NOW HAVE ESTABLISHED, FOR PURPOSES OF THIS MOTION, THAT THE TECHNOLOGY ITSELF AT LEAST IS TECHNICALLY COMPARABLE.

SO THEN WE GO TO THE QUESTION OF THE LUCENT ISSUE, AND IT'S VERY EASY FOR THEM TO SAY, WELL, THEY'VE LOOKED AT THE JMOL. BUT THAT'S NOT WHAT THE EXPERT DID. THE EXPERT LOOKED AT THE NEGOTIATION THAT RESULTED IN THE $45 MILLION LICENSE AND TREATED THAT AS A HYPOTHETICAL NEGOTIATION. WE KNOW THERE WAS A $45 MILLION LUMP SUM LICENSE.

MR. GLITZENSTEIN: YOUR HONOR, I APOLOGIZE FOR INTERRUPTING MY BROTHER, BUT THAT'S A PIECE OF CONFIDENTIAL INFORMATION THAT IS BEING REPORTED IN OPEN COURT.

MR. BHATIA: OH.

THE COURT: WELL, WE CAN -- I'LL NOTE FOR THE PURPOSES OF THE RECORD THAT THE COURT IS CLEAR OF ALL PEOPLE OTHER THAN THOSE ASSOCIATED WITH THE PARTIES.

MR. BHATIA: I'LL BE MORE CAREFUL. I APOLOGIZE.

THE COURT: IF I NEED TO, I'M HAPPY TO CORRECT THE TRANSCRIPT.

MR. BHATIA: I'M SORRY FOR THAT.

THERE WAS A NUMBER, OKAY, X, IN THIS HYPOTHETICAL NEGOTIATION.

NOW, THERE WAS A JMOL. WHAT DID MILLS DO WITH THE JMOL?

AND I SHOULD BE MORE CAREFUL AND I DO APOLOGIZE, YOUR HONOR. I GOT GOING AND I'LL BE MUCH MORE CAREFUL IN THE FUTURE.

THE COURT: I'M SURE YOU WILL. GO AHEAD.

MR. BHATIA: ON THE ISSUE OF THE JMOL, ALL MILLS DOES IS HE LOOKS AT THE JMOL TO DETERMINE WHAT PERCENTAGE OF THE DAMAGES AWARDED ARE ATTRIBUTABLE TO THE PATENTED TECHNOLOGY THAT IS COMPARABLE TO THE TECHNOLOGY AT ISSUE IN THIS CASE.

AND HE EXCLUDES, BY DEFINITION -- BECAUSE THERE WAS ROUGHLY -- I THINK I CAN SAY THE AMOUNT OF THE DAMAGES, RIGHT?

MR. GLITZENSTEIN: THE JMOL AMOUNT, YES.

MR. BHATIA: YEAH. IT WAS IN THE -- IT HAD A 4 IN IT AND IT HAD A 0 AND IT WAS EIGHT FIGURES. IT WAS KIND OF LIKE THAT, SOMETHING LIKE THAT.

(LAUGHTER.)

THE COURT: I GET IT.

MR. BHATIA: BUT INCLUDED IN THAT NUMBER WAS SOME LEGAL FEES, BECAUSE LAWYERS COST MONEY, INTEREST, COURT COSTS, SOME STUFF FOR ANOTHER MICROSOFT PRODUCT.

THE COURT: SO HE TAKES THAT, BREAKS THAT OUT, AND PUTS IT TO THE SIDE.

MR. BHATIA: RIGHT, WHICH IS JUST A FINDING BY THE

COURT. AND THE COURT SAYS THESE ARE THE DOLLARS ATTRIBUTABLE TO THAT, AND A SUBSET OF IT, IN THE $24 MILLION RANGE, IS ATTRIBUTABLE TO MICROSOFT, TO THE OUTLOOK PRODUCT, WHICH IS THE COMPARABLE TECHNOLOGY.

SO HE'S NOT USING THE JMOL FOR THE PURPOSE OF THE HYPOTHETICAL NEGOTIATION. HE'S USING THE JMOL FOR PURPOSES OF A CONSERVATIVE ADJUSTMENT TO THE LUMP SUM NUMBER.

NOW, IMAGINE IF WE CAME HERE AND JUST USED THE LUMP SUM NUMBER. IF THAT'S WHAT WE DID, WE WOULD BE ATTACKED ON DAUBERT BY MICROSOFT, AND PROBABLY RIGHTFULLY SO, BY SAYING, LOOK, YOU DIDN'T DO ANYTHING TO APPORTION THE LUMP SUM AMOUNT FOR THE TECHNOLOGY THAT'S COMPARABLE TO WHAT YOU'RE SUING ON IN THIS CASE, AND THEY MIGHT HAVE HAD A POINT THERE.

BUT NOW THEY'RE COMPLAINING BECAUSE WE DID EXACTLY WHAT WE'RE SUPPOSED TO, WHICH IS APPORTIONMENT, AND MADE A CONSERVATIVE ASSUMPTION WHICH IS SUPPORTED BY THE FACTS.

THE COURT: CAN I ASK YOU, MR. BHATIA, WOULD YOU AT LEAST AGREE WITH MICROSOFT THAT THE CASE LAW IS RATHER THIN ON THIS TYPE OF ANALYSIS, THAT IS, AN ANALYSIS PREDICATED ON APPORTIONMENT USING A JMOL?

MR. BHATIA: I AGREE WITH THAT. I AGREE WITH THAT. AND IT'S THIN BOTH WAYS. BUT THE CASE LAW STARTS --

THE COURT: TRUE. IT'S NOT AS IF I HAVE ANY CASE LAW THAT TELLS ME DON'T DO THAT, EITHER.

MR. BHATIA: NO. YOU HAVE TO START FROM THE

PROPOSITION THAT -- AND I AGREE. YOU START FROM THE PROPOSITION THAT LITIGATION LICENSE AGREEMENTS THEMSELVES, I AGREE, ARE NOT TYPICALLY USED.

AND RESQNET -- AFTER RESQNET, THE COURT DOES SAY, YES, YOU CAN USE THEM.

BUT I'D LIKE YOUR HONOR TO KEEP IN MIND, THIS IS NOT A SITUATION, BECAUSE WE ASKED MICROSOFT, THIS IS NOT A SITUATION WHERE THERE'S SOME OTHER LICENSE THAT IS NON-LITIGATION BASED THAT WE ARE IGNORING. RIGHT? AND THEY CAN'T POINT TO ONE. THIS IS NOT A SITUATION WHERE MICROSOFT SAID, HEY, HERE'S TWO LICENSES, WE THINK THESE ARE THE RIGHT VALUES, WE THINK THESE ARE THE MOST COMPARABLE, BECAUSE WE ASKED THEM.

AND THEY SAID, NO, THESE ARE THE MOST COMPARABLE LICENSES. THIS IS THE -- WE'RE NOT SAYING IT'S PERFECT, MICROSOFT SAYS, BUT THEY'RE SAYING THIS IS THE CLOSEST WE'VE GOT, THE LUCENT LICENSE, ARENDI.

SO WE USED THEM. SO WE'RE REALLY IN A SITUATION WHERE -- AND THIS IS EXACTLY WHERE IT FALLS WITHIN THE EXCEPTION IN THE CASES -- WHICH IS IF IT'S ALL YOU'VE GOT, IF IT'S THE ONLY THING YOU CAN USE, YOU GET TO USE IT.

IMAGINE IF WE DIDN'T USE IT. THEN WE WOULD BE COMING TO YOUR HONOR AND SAYING, HERE'S A HYPOTHETICAL NEGOTIATION WITH NO BACKING AT ALL, AND MICROSOFT WOULD MOVE ON DAUBERT AND THEY WOULD SAY, WELL, YOU OUGHT TO HAVE AT LEAST USED THE LICENSES THAT WERE AVAILABLE.

SO WE DID EXACTLY WHAT THE CASE LAW SAYS, WHICH IS YOU CAN USE LITIGATION LICENSES WHERE THEY'RE COMPARABLE, ESTABLISHED BY MADISETTI, AND WHERE THEY'RE THE ONLY THINGS AVAILABLE.

AGAIN, THOSE ARE THE FACTS ACCORDING TO MICROSOFT, SO WE USED THEM.

SO THEN THERE WAS THIS APPORTIONMENT. AND I AGREE THAT THAT IS THIN, BUT IT'S THIN BECAUSE YOU TYPICALLY AREN'T USING LITIGATION LICENSES, VERY FEW CASES, AND THEN YOU TYPICALLY DON'T HAVE LITIGATION LICENSES THAT ALSO HAVE AN ACCOMPANYING JMOL.

BUT WE DID IT IN A WAY THAT'S, I THINK, VERY REASONABLE. AND IT'S VERY EASY FOR MICROSOFT -- IF THEY DISAGREE WITH THE WEIGHT TO BE GIVEN TO THAT ASSUMPTION, THEY CAN CROSS MR. MILLS AND SAY, WELL, IT SHOULD BE LOWER, OR IT SHOULD BE HIGHER. 24 IS TOO MUCH, IT REALLY OUGHT TO BE 18. AND THEN THE JURY CAN MAKE A JUDGMENT.

THE COURT: CAN I ASK YOU, MR. BHATIA, JUST IN THINKING THIS THROUGH AND TRYING TO THINK AHEAD, IF I WERE TO PERMIT THIS TESTIMONY, ONE MAJOR CONCERN I HAVE IS WHAT ON EARTH DO I SAY TO THIS JURY ABOUT HOW TO USE THIS AND WHAT THIS JUDGMENT EVEN REPRESENTS?

MR. BHATIA: I THINK THIS IS SO EASY TO FIX, YOUR HONOR. WE JUST -- WE'LL MAKE SURE -- AND, AGAIN, I'LL BE EXTREMELY CAREFUL, MUCH MORE SO THAN I WAS A FEW MINUTES AGO -- WE WON'T REFER TO IT AS A JMOL. WE WON'T REFER TO IT AS

SOMETHING COMING OUT OF A FINDING OF INFRINGEMENT. WE CAN COME TO AN AGREEMENT WITH MICROSOFT TO ADDRESS THEIR PREJUDICE.

AGAIN, PREJUDICE IS NOT A GROUNDS FOR A DAUBERT CHALLENGE, RIGHT, EXTREME PREJUDICE. YOU DEAL WITH IT UNDER RULE 403, AND THE WAY YOU DEAL WITH IT UNDER RULE 403 IS WE CALL IT SOMETHING ELSE. WE'LL CALL IT THE SUPER SECRET HYPOTHETICAL NEGOTIATION RESULTED IN THIS NUMBER. WE CAN COME UP WITH SOMETHING THAT DEALS WITH THAT.

THE COURT: YOU AGREE, THOUGH, THAT PART OF THE CHALLENGE HERE WOULD BE, ON THE ONE HAND, TO PROTECT MICROSOFT AGAINST ANY UNDUE IMPLICATION BY CHARACTERIZING IT AS A JUDGMENT OR JMOL?

MR. BHATIA: I AGREE. I AGREE.

BUT I THINK IT'S VERY DOABLE, YOUR HONOR. AND WE WOULD NOT ATTEMPT TO USE THIS AS A BACK DOOR WAY TO SAY THAT MICROSOFT WAS A SERIAL PATENT INFRINGER.

THE COURT: OF COURSE ONE OTHER WAY TO SOLVE THAT PROBLEM MIGHT BE THE OTHER MOTION THAT IS ON MY AGENDA THIS AFTERNOON, WHICH IS TO SIMPLY BIFURCATE THAT ISSUE, BUT I DON'T WANT TO GET AHEAD OF MYSELF.

MR. BHATIA: NO, NO, AND I DON'T THINK WE SHOULD GET INTO BIFURCATION.

BUT HOW WE CHARACTERIZE WHAT DR. MILLS DOES CAN EASILY BE HANDLED THROUGH A MOTION IN LIMINE, YOUR HONOR, AND YOUR HONOR HAS DEALT WITH OTHER COMPLICATED QUESTIONS OF EVIDENCE WHERE

YOU HAVE ISSUES OF PREJUDICE AND YOU CAN GIVE INSTRUCTIONS TO THE LAWYERS. WE CAN FIND A SOLUTION TO THAT. I DON'T THINK YOU SHOULD -- THAT IS NOT THE ISSUE.

SO THEN WHAT'S THE SECOND ISSUE, THE SECOND ARGUMENT THEY MAKE? THEY MAKE THE LUMP SUM ARGUMENT.

AND ON THIS THEY'RE JUST WRONG. I MEAN, THEY'RE -- I DON'T KNOW HOW ELSE TO SAY IT. THEY'RE WRONG BECAUSE IF YOU LOOK AT THE CASE LAW THAT WE CITE ON PAGE 12, THE COURT SAYS AS LONG AS THERE'S SOME BASIS --

THE COURT: THERE HAS TO BE A HOOK.

MR. BHATIA: THERE HAS TO BE A HOOK. THERE HAS TO BE CONVERSION.

WHAT DO WE HAVE IN THIS CASE? THE ADDED ADVANTAGE WE HAVE IN THIS CASE IS WE SAW WHAT -- THE SLIDE THEY PUT UP WITH ALL THE THINGS THAT MIGHT HAPPEN IN A NEGOTIATION OVER A LUMP SUM AND KIND OF A COUPLE OF THE KEY POINTS ALL TIED TO IS THERE SOMETHING THAT YOU -- ARE YOU BUYING SOME LICENSE FOR THE FUTURE OR SOME PIECE?

YOU HAVE TO KEEP IN MIND, THE PATENT HAD EXPIRED AT THE TIME OF THE AGREEMENT, SO IT WAS ALL PAST DAMAGES.

AND AS MILLS KNEW FROM THE JMOL, HE KNEW THE EXACT AMOUNT OF THE LICENSE, HE KNEW EVERY UNIT AT ISSUE BECAUSE THAT WAS IN THE RECORD. IT WAS ALL PAST DAMAGES. THERE WAS NO FUTURE -- THEY WEREN'T BUYING A LICENSE TO BE ABLE TO SELL PRODUCTS IN THE FUTURE SO YOU COULD ATTRIBUTE IT ON A PER UNIT BASIS.

AND SO IF THERE'S ANY CASE, YOUR HONOR, THAT CAN -- WHERE YOU CAN TAKE A LUMP SUM AND CONVERT IT INTO A RUNNING ROYALTY, I SUBMIT IT'S THIS ONE WHERE THE PATENT IS EXPIRED, THERE'S NO ISSUE OF INFRINGEMENT.

THE COURT: THAT'S INTERESTING. SO BECAUSE OF THE TIMING OF THE AGREEMENT, BY DEFINITION -- AND BECAUSE THAT TIMING POST-DATED THE EXPIRATION OF THE PATENT, YOU'RE SAYING, BY DEFINITION, EVERYTHING WE WERE TALKING ABOUT IN THAT CASE WAS PAST DAMAGES?

MR. BHATIA: CORRECT.

THE COURT: SO REALLY TO CHARACTERIZE IT AS EITHER A LUMP SUM OR RUNNING ROYALTY DOESN'T MAKE SENSE.

MR. BHATIA: IT DOESN'T MAKE A DIFFERENCE. IT'S A DISTINCTION OF NO MOMENT BECAUSE IT'S ALL PAST DAMAGES.

IN THE TYPICAL LUMP SUM LICENSE, THEY MIGHT HAVE SOME LEGS BECAUSE YOU PAY --

THE COURT: BECAUSE THERE'S UNCERTAINTY PROSPECTIVELY.

MR. BHATIA: CORRECT.

THE COURT: THERE'S PERFECT CERTAINTY RETROSPECTIVELY.

MR. BHATIA: EXACTLY. AND YOU'RE BUYING A RIGHT TO USE IT IN THE FUTURE, AND THE RIGHT TO USE IT IN THE FUTURE, A PIECE OF THAT -- WHATEVER YOUR PAYMENT IS, YOU PAY $10 MILLION, A PIECE OF IT IS TO SETTLE THE PAST AND A PIECE OF IT IS TO

OPERATE IN THE FUTURE.

SO THE CASES WE CITE AT PAGE 12 ARE SPOT ON. THEY SAY, AT THE BOTTOM OF 12 OF OUR BRIEF, THAT YOU CAN CONVERT A LUMP SUM INTO A RUNNING ROYALTY IN THE RIGHT CIRCUMSTANCE.

AND A GOOD CASE TO LOOK AT, YOUR HONOR, IS THE MULTIMEDIA PATENT TRUST VERSUS APPLE. IT'S THE SOUTHERN DISTRICT OF CALIFORNIA. AND IN THAT CASE, THE EXPERT CONVERTED A LUMP SUM INTO A RUNNING ROYALTY, BUT WAS ALSO DEALING -- AND SOME OF THE PATENTS THEY LOOKED AT, SOME OF THE LICENSES WERE PURE LUMP SUM, AND SOME WERE LUMP SUM AND RUNNING ROYALTY. AND SO THE COURT SAID, YEAH, THIS IS FINE.

BUT WHAT MICROSOFT HAS TRIED TO CREATE, WHICH IS NOT IN THE CASES, THEY'VE TRIED TO CREATE THIS LEGAL CONSTRUCT THAT SAYS THE ONLY WAY IN WHICH YOU CAN CONVERT A LUMP SUM TO A RUNNING ROYALTY IS IF THE LUMP SUM ITSELF HAD SOME -- WAS SOME ROYALTY-BASED CALCULATION, AND NO CASE STANDS FOR THAT PROPOSITION. I READ THEIR CASES. THEY DON'T QUOTE A STATEMENT LIKE THAT. THEY DON'T EVEN PUT THAT UP ON THE POWERPOINT. SO THAT ISN'T AN ARGUMENT.

SO THAT WAS THEIR TWO PRINCIPLE ARGUMENTS.

AND FROM THERE THEY WENT TO THE INCOME APPROACH AND TRIED TO ARGUE THAT SOMEHOW IT WAS PURELY DERIVATIVE WHEN IT WASN'T. THE INCOME APPROACH, I AGREE, IS HEAVILY DEPENDENT ON WECKER, AND WHEN WE TAKE WECKER UP, MY COLLEAGUE, MR. ARD, WILL TAKE THAT UP. BUT IT'S DEPENDENT ON WECKER.

HE THEN CALCULATES THE AMOUNT OF LOST SALES. HE PERFORMS THE VERY ASSESSMENT THAT'S REQUIRED.

AND YOU CAN LOOK AT THE MICROSOFT POWERPOINT AGAIN. I MEAN, I THINK IT'S SLIDE 12. THEY HAD THE SLIDE WHERE THEY HAVE EACH FACTOR -- YEAH, SLIDE 12 -- EACH FACTOR AS BEING ANALYZED BY MILLS. I MEAN, THESE ARE THE FACTORS REQUIRED BY THE CASES. HE DOES THE ANALYSIS. THEY DON'T LIKE THE RESULT, BUT THAT'S SOMETHING THEY ASK ON CROSS-EXAMINATION, NOT ON DAUBERT.

AND SO THE ONLY OTHER POINT I THINK WORTH MENTIONING IS IT'S NOT -- I THINK I'VE ADDRESSED THE ISSUE OF IT'S NOT A DISGUISED MARKET VALUE ANALYSIS.

I DO THINK WE GET, UNDER GEORGIA-PACIFIC, TO PUT IN THE PROFITS BECAUSE THE PROFITABILITY OF OFFICE GOES TO THE IMPORTANCE OF OFFICE AND IT'S SOMETHING THAT WE CAN USE.

AGAIN, IF YOU THINK THERE'S, THERE'S GOING TO BE SOME NEED TO DO LIMITING INFORMATION, THAT'S NOT DAUBERT, THAT'S RULE 403.

AND IF YOU HAVE ANY OTHER QUESTIONS, I'M HAPPY TO ANSWER THEM.

THE COURT: I THINK I HAVE YOUR POSITION.

MR. BHATIA: THANK YOU.

THE COURT: ANY BRIEF REBUTTAL.

MR. GLITZENSTEIN: YES, YOUR HONOR, JUST A FEW POINTS HERE.

THE COURT: SURE, GO AHEAD.

MR. GLITZENSTEIN: I ACTUALLY WANTED TO START ON THIS INCOME APPROACH ISSUE, BECAUSE I WAS STRUCK BY A COMMENT THAT THE INCOME APPROACH HAS BEEN ADOPTED BY THE FEDERAL CIRCUIT.

I'M NOT AWARE OF THAT. I CERTAINLY KNOW THAT IT WAS WHAT WAS OFFERED AS LUCENT'S THEORY IN SOUTHERN CALIFORNIA.

THE COURT: BEFORE THE CASE RESOLVED.

MR. GLITZENSTEIN: BEFORE IT RESOLVED.

AND ACTUALLY, I WOULD SUBMIT THAT LASERDYNAMICS SAYS THAT IT IS A FLAWED THEORY. LASERDYNAMICS SAYS THAT THE TYPE OF QUESTION THAT DR. WECKER ASKED HERE IS THE WRONG QUESTION ON WHICH TO DRAW CONCLUSIONS ABOUT THE VALUE OF A PRODUCT.

THE HYPOTHETICAL THAT THE LASERDYNAMICS COURT IDENTIFIED WAS, YOU KNOW, SIMPLY SOMEBODY SAYING THEY WOULD NOT BUY A LAPTOP COMPUTER BECAUSE IT DIDN'T HAVE A BATTERY ISN'T PROBATIVE, ISN'T SUFFICIENTLY PROBATIVE TO ALLOW THE USE OF THE ENTIRE VALUE OF THE LAPTOP TO BE THE BASIS FOR THE DAMAGES CLAIM.

WELL, THAT'S WHAT DR. WECKER HAS PURPORTED TO DO IN COMBINATION WITH DR. MILLS. HE'S ASKED QUESTIONS, WOULD YOU HAVE PURCHASED THE SOFTWARE IF IT LACKED THESE TWO INSTRUMENTALITIES?

THAT'S EXACTLY THE SAME QUESTION THAT THE FEDERAL CIRCUIT SAID IN LASERDYNAMICS IS MEANINGLESS.

THE COURT: RIGHT. BUT THE PROBLEM IN LASERDYNAMICS

WAS THAT THE POSITED FUNCTIONALITY WENT BEYOND THE CLAIMED INVENTION.

MR. GLITZENSTEIN: THAT WAS -- THAT WAS A PART OF IT, THAT'S RIGHT. IT WAS -- AND JUST -- JUST BECAUSE SOMEBODY WOULD NOT HAVE PURCHASED A PRODUCT IF IT LACKED A PARTICULAR FEATURE DOESN'T, THEREFORE, ALLOW THE PATENT OWNER TO USE THE VALUE, THE ENTIRE REVENUE OF THAT PRODUCT, AS THE BASIS FOR ITS DAMAGES CLAIM.

THE COURT: EVEN IF THE PATENTS EXPAND TO THE FULL SCOPE OF THE FEATURE; RIGHT?

MR. GLITZENSTEIN: RIGHT.

THE COURT: TO USE THE BATTERY EXAMPLE YOU REFERENCE FROM LASERDYNAMICS, IT WOULD -- IT WOULD BE FUNDAMENTALLY FLAWED, UNDER THAT REASONING, TO ALLOW A PARTY TO USE THE REVENUE FOR THE ENTIRE LAPTOP, EVEN IF THE PATENT CLAIM WASN'T LIMITED TO SOME FEATURE OF THE BATTERY, BUT RATHER EXTENDED TO AN ENTIRE BATTERY, AND THE REASON IS THAT A BATTERY IS JUST ONE DRIVER OF DEMAND AND THE BURDEN ON THE PARTY OFFERING THE THEORY IS TO SHOW THAT IT IS THE DRIVER OF DEMAND IN ORDER TO CLAIM THAT REVENUE. RIGHT?

MR. GLITZENSTEIN: THAT'S RIGHT. AND THAT'S THE EXACT SAME FRAMEWORK OF QUESTION THAT DR. WECKER USED, AND THEN IT WAS THE RESULTS -- THE ANSWERS TO THOSE QUESTIONS THAT DR. -- I'M SORRY -- THAT MR. MILLS THEN USED TO, TO JUSTIFY REALLY USING THE INCOME APPROACH.

SO I DON'T THINK THAT THE INCOME APPROACH HAS BEEN APPROVED BY THE FEDERAL CIRCUIT. I MAY BE WRONG ABOUT THAT. I DIDN'T HEAR MY BROTHER CITE A CASE ON THAT. I DON'T RECALL ONE IN HIS BRIEFS.

BUT CLEARLY THE ANALYSIS OF LASERDYNAMICS IS JUST AS APPLICABLE TO THE INCOME APPROACH AS IT WAS TO LASERDYNAMICS. IT'S JUST ANOTHER WAY OF GETTING TO THE SAME FORBIDDEN RESULT.

I JUST WANT TO RESPOND BRIEFLY. THE COMPARABILITY, ALTHOUGH MY BROTHER DID MENTION THAT HE BELIEVES IT NOT TO BE AN ISSUE, IT IS VERY MUCH AN ISSUE ON THIS MOTION.

JUST TO BE BRIEF ON THAT, THE ISSUE OF COMPARABILITY WAS THEY FAILED TO COMPARE THE PATENTED FEATURES. IT WAS REALLY THE PATENTED FEATURES AS APPLIED TO THE ACCUSED PRODUCTS.

THE COURT: AND I READ YOUR PAPERS AS CERTAINLY TAKING ISSUE WITH THAT ANALYSIS, EVEN IF YOU DID NOT BRING A SEPARATE MOTION ATTACKING DR. MADISETTI ON THAT POINT.

MR. GLITZENSTEIN: RIGHT. I MEAN, IT'S -- FROM OUR PERSPECTIVE, WE HAD TWO MOTIONS ALREADY. I COULDN'T IMAGINE A THIRD WOULD HAVE REALLY ADDED MUCH TO THE DISCUSSION.

THE COURT: IT'S REALLY ABOUT MILLS' RELIANCE UPON MADISETTI AS OPPOSED TO MADISETTI ITSELF, EVEN IF YOU HAVE ALL SORTS OF ISSUES YOU'RE GOING TO BRING UP IN AT TRIAL IN CROSSING DR. MADISETTI.

MR. GLITZENSTEIN: THAT'S RIGHT, YOUR HONOR. AND IT'S REALLY -- YOU CAN LOOK AT IT IN TERMS OF IT'S REALLY UP TO

MR. MILLS TO ENSURE THAT IF HE'S RELYING ON PREDICATE OR FOUNDATIONAL OPINIONS FROM DR. MADISETTI, THAT THOSE PREDICATE OR FOUNDATIONAL OPINIONS ACTUALLY CONFORM TO WHAT THE FEDERAL CIRCUIT HAS SAID IS WHAT DR. MADISETTI WAS SUPPOSED TO HAVE DONE, AND HE -- AND DR. MADISETTI JUST DID THE WRONG COMPARISON.

AS FAR AS THE ISSUE OF THE LUCENT SETTLEMENT AGREEMENT AND THE AMOUNT OF THAT, I MEAN, AGAIN, WHAT WAS SORT OF STRIKING TO ME IN MY BROTHER'S COMMENTS WAS THERE WAS NO CITATION TO ANYTHING IN MR. MILLS' EXPERT REPORT, NO CITATION TO ANYTHING IN HIS DEPOSITION WHERE THIS SETTLEMENT FIGURE, AS OPPOSED TO THE JMOL FIGURE, WAS USED FOR ANY ANALYTICAL OR APPORTIONMENT PURPOSE, OR ANYTHING. IT SIMPLY DID NOT HAPPEN IN THAT ANALYSIS.

THE COURT: SO THERE'S NO REFERENCE AT ALL TO THAT FIGURE?

MR. GLITZENSTEIN: THERE ARE TWO REFERENCES IN HIS REPORT, BUT THERE'S NO -- THERE'S NO APPORTIONMENT OR ANALYSIS BASED ON IT. IT'S SORT OF -- IT'S A -- THE FIRST REFERENCE TO IT IS SORT OF A CONTEXTUAL FACT IN THE BACKGROUND DISCUSSION FROM MR. MILLS.

THE COURT: BUT IT'S NOT LIKE HE'S TAKING THAT FIGURE AND THEN SLICING AND DICING IT ACCORDING TO WHAT THE JMOL SAID.

MR. GLITZENSTEIN: THAT'S CORRECT.

AND JUST SORT OF AS A COUNTERPOINT TO THAT, I PUT UP ON

THE SCREEN WHERE MR. MILLS CAME UP WITH THIS 22 PERCENT, 78 PERCENT SPLIT. THERE'S NOTHING LIKE THAT THAT HE DOES WITH THE SETTLEMENT AMOUNT FROM THE LUCENT ISSUE.

OKAY. THE -- THE LAST POINT I WANT TO ADDRESS IS THIS CONVERSION OF A LUMP SUM TO A RUNNING ROYALTY, AND I BELIEVE YOUR HONOR'S QUESTION TO MY BROTHER WAS THERE HAS TO BE A HOOK, AND HE AGREED, AND PERHAPS IT'S JUST THAT WE VIEW THAT HOOK VERY FUNDAMENTALLY DIFFERENTLY.

BUT THERE ARE CERTAINLY DECISIONS -- THERE'S A DECISION OUT OF EASTERN TEXAS THAT WE CITED THAT SORT OF FOLLOWS THE SAME LOGIC THAT WE'RE SUGGESTING HERE, THAT IF THE -- THAT THE CIRCUMSTANCES THAT LEAD TO THE SELECTION, IF YOU WILL, BY THE PARTIES OF A LUMP SUM ARE JUST DIFFERENT THAN A RUNNING ROYALTY, AND SO IN GENERAL TERMS THERE'S NO BASIS TO CONVERT.

BUT, AGAIN, I COME BACK TO THE POINT, HERE WE DON'T HAVE TO GUESS. IF THEY WANTED TO EMBRACE WHAT HAPPENED IN THE LUCENT CASE, THEY COULD HAVE FOLLOWED WHAT MR. SIMS DID IN THAT CASE, WHICH WAS NOT TO APPLY A RUNNING ROYALTY AT ALL.

SO I CANNOT SEE HOW THEY HAVE ANY BASIS TO TAKE A NUMBER THAT WAS DERIVED FROM A WHOLLY DIFFERENT THEORY AND THEN CONVERT IT TO A RUNNING ROYALTY AND SAY THAT HAS ANY PROBATIVE VALUE WHATSOEVER.

AND UNLESS YOUR HONOR HAS FURTHER QUESTIONS --

THE COURT: NO, I THINK I HAVE YOUR POSITION. THANK YOU ALL VERY MUCH.

MR. BHATIA: YOUR HONOR, MAY I JUST SPEAK BRIEFLY?

THE COURT: OF COURSE.

MR. BHATIA: I WANT TO BE REAL QUICK.

I MEAN, WE DEAL WITH THIS POINT, THIS ALLEGED POINT THAT MR. MILLS DID NOT LOOK AT THE LICENSE AGREEMENT AT THE VERY BEGINNING OF OUR BRIEF. IT'S THE FIRST POINT WE MAKE UNDER THE ARGUMENT. IT'S ON OUR PAGE 6.

THE PAGES IN THE MILLS REPORT ARE PAGES 41 TO 42 AND PAGES 89 TO 104. AND IN FOOTNOTE 1, WE HAVE ADDITIONAL CITATIONS.

AND WHAT -- AS YOUR HONOR KNOWS -- AND I WANT TO BE VERY CAREFUL HERE -- THE JMOL AMOUNT WAS ONE AMOUNT. THE LUMP SUM AGREEMENT WAS AN AMOUNT THAT EXCEEDED THE JMOL AMOUNT BY A LITTLE BIT.

THE COURT: A CERTAIN AMOUNT.

MR. BHATIA: A LITTLE BIT.

AND AS A RESULT, ONCE YOU DO THE APPORTIONMENT, YOU ARE GOING TO BE AT AN AMOUNT THAT'S LESS THAN BOTH, AND SO HE EXPLAINS HOW HE JUST WALKS THROUGH THAT.

AND SO YOU CAN SAY, OH, WELL, YOU'RE RELYING ON THE JMOL FOR THAT, BUT YOU'VE JUST GOT TO WORK IT MATHEMATICALLY. IF THE LICENSE IS MORE THAN THE JMOL AND THE OTHER NUMBER IS LOWER, YOU'RE WORKING YOUR WAY DOWN. IT IS NOT A SITUATION WHERE WE WORKED OUR WAY UP.

THE COURT: I UNDERSTAND. THANK YOU.

LET'S TAKE A VERY SHORT BREAK AND THEN WE'LL TURN TO WECKER.

(RECESS FROM 4:24 P.M. UNTIL 4:33 P.M.)

THE COURT: ALL RIGHT. WHY DON'T WE CONTINUE WHERE WE LEFT OFF? WE'RE GOING TO TALK ABOUT DR. WECKER.

MR. GLITZENSTEIN: ALL RIGHT. MAY I PROCEED, YOUR HONOR?

THE COURT: OF COURSE.

MR. GLITZENSTEIN: AND, YOUR HONOR, THIS TIME I'LL REMEMBER AT THE OUTSET, I'VE GOT JUST A SMALL SET OF SLIDES. MAY I HAND THEM UP?

THE COURT: YOU MAY.

AS A PRELIMINARY QUESTION, I THINK WE TALKED EARLIER THIS AFTERNOON ABOUT THIS SORT OF EMERGING PANOPLY OF FEDERAL CIRCUIT CASES ON DAMAGES.

DR. WECKER'S NAME SOUNDED AWFULLY FAMILIAR TO ME. IS HE THE SUBJECT OF ANY OF THOSE CASES BY ANY CHANCE?

MR. GLITZENSTEIN: I BELIEVE HE WAS THE EXPERT FOR I4I.

THE COURT: THAT'S WHERE I SAW DR. WECKER. OKAY. THANK YOU. I JUST WANTED TO MAKE SURE I WASN'T MISREMEMBERING.

GO AHEAD.

MR. GLITZENSTEIN: THANK YOU, YOUR HONOR.

JUST TO SORT OF SET THE TABLE HERE ON SLIDE 2, JUST AS TO THE FLAWS THAT WE CONTEND ANYWAY ARE IN DR. WECKER'S, BOTH HIS

SURVEY METHODOLOGY AND THEN HOW HE SORT OF PROCESSES THE DATA THAT HE GETS FROM THE SURVEY, THESE ARE THE ONES THAT I THOUGHT I WOULD FOCUS ON THIS AFTERNOON JUST TO SORT OF DRAW SOME OF THE POINTS.

AND JUST TO -- JUST TO SUMMARIZE, REALLY THERE WERE, THERE WERE ISSUES JUST SIMPLY ABOUT WHAT DR. WECKER ASKED PEOPLE THEIR OPINIONS ON AND THE BREADTH OF THOSE QUESTIONS AND, FRANKLY, THE AMBIGUITY.

THERE WERE STRUCTURAL ISSUES IN HOW HE POSED THOSE QUESTIONS THAT WE CONTEND WERE LEADING PEOPLE TO OVERSTATE THEIR INTEREST IN THE ACCUSED INSTRUMENTALITIES IN THIS MANNER.

AND THEN LASTLY, THEY LACKED QUALITY CONTROLS THAT WE BELIEVE THE LITERATURE SHOWS ARE A PART OF THE GENERAL AND ACCEPTED METHODOLOGY FOR CONDUCTING SURVEYS WHERE -- AND I WANT TO UNDERSCORE THIS POINT -- WHERE THE PURPOSE OF THE SURVEY IS TO MAKE A BUSINESS DECISION.

AND MAYBE I SHOULD START THERE BECAUSE I THINK IT'S FUNDAMENTAL. I MEAN, ONE CAN TAKE A SURVEY FOR REALLY ANYTHING. YOU CAN TAKE A STRAW POLL OF PEOPLE TO GET THEIR OPINIONS. THERE ARE MANY WAYS TO DO THAT.

BUT THAT'S NOT THE PURPOSE OF DR. WECKER'S SURVEY. DR. WECKER'S SURVEY IS BEING PUT TO USE BY MR. MILLS IN THIS INCOME APPROACH, AND ALSO WITH HIS LUCENT APPROACH, TO SAY THAT MICROSOFT, IN FACT, WOULD HAVE PAID SUBSTANTIAL SUMS OF MONEY, MULTI MILLIONS OF DOLLARS ACTUALLY, TO SENTIUS ON THE STRENGTH

OF THE NUMBERS HERE.

THAT PLACES THE SURVEY INTO A VERY SPECIAL CATEGORY AND ONE THAT REALLY REQUIRES A SIGNIFICANT AMOUNT OF RIGOR BEFORE ANY COMPANY WOULD BASE ANY SIGNIFICANT COMMERCIAL DECISION ON THE STRENGTH OF THE RESULTS.

AND WE'RE JUST --

THE COURT: I'M SORRY FOR INTERRUPTING YOU. I JUST WANT TO MAKE SURE I UNDERSTAND, AS PRECISELY AS I NEED TO, HOW MILLS USED WECKER.

IS IT THAT MILLS LOOKED TO WECKER'S SURVEY AS EVIDENCE OF WHAT MICROSOFT, AND THE PARTIES AS A WHOLE, WOULD HAVE CONSIDERED IN THE HYPOTHETICAL NEGOTIATION?

OR DOES WECKER'S SURVEY DATA SIMPLY INFORM MILLS ON OTHER GEORGIA-PACIFIC FACTORS INDEPENDENT OF WHAT THE PARTIES -- I MAY BE DRAWING A DISTINCTION WITHOUT A DIFFERENCE. I'M NOT SURE I'M BEING CLEAR.

BUT DO YOU SEE WHAT I'M GETTING AT? WHAT I'M TRYING TO FIGURE OUT IS DOES MILLS SAY THAT THE PARTIES, INCLUDING MICROSOFT, WOULD HAVE CONSIDERED A SURVEY LIKE WECKER'S IN THEIR HYPOTHETICAL NEGOTIATION? OR IS IT SOMETHING ELSE?

MR. GLITZENSTEIN: I THINK IT'S ACTUALLY BOTH OF THOSE THINGS.

THE COURT: MAYBE THAT'S WHY I'M SO CONFUSED. HELP ME OUT.

MR. GLITZENSTEIN: SO THERE ARE TWO CAPACITIES IN

WHICH MR. MILLS USES DR. WECKER'S SURVEY FIRST.

AS PART OF THE LUCENT ANALYSIS, HE LOOKS AT THE RESPONDENT'S STATED WILLINGNESS TO PAY FOR THESE TWO FEATURES, THESE TWO FUNCTIONALITIES, AND COMES UP WITH A DOLLAR VALUE ON THAT AND USES THAT AS A WAY TO COMPARE AND CONTRAST REALLY WITH WILLINGNESS TO PAY DATA THAT LUCENT'S SURVEY EXPERT, DR. JAY, HAD COLLECTED.

SO IT'S A WAY TO TRY TO DO A COMPARISON.

THE COURT: I THINK I UNDERSTAND THAT.

MR. GLITZENSTEIN: THE SECOND WAY, THOUGH, IS -- I THINK IT'S -- WELL, IT'S THE INCOME APPROACH IS THE SECOND CAPACITY, AND IT IS -- AS I UNDERSTAND MR. MILLS' ANALYSIS, IT IS SORT OF THE FIRST SCENARIO THAT YOU TALKED ABOUT, NAMELY, THIS IS A NUMBER THAT MICROSOFT WOULD HAVE LOOKED AT AND SORT OF BEEN COGNIZANT OF AND -- AND REALIZED THAT IT WAS -- IT WOULD HAVE LOST SIGNIFICANT SALES HAD IT LACKED THESE TWO FEATURES AND, THEREFORE, AS A PRODUCT OF THAT GIVE AND TAKE IN THE HYPOTHETICAL NEGOTIATION, SENTIUS WOULD HAVE WOUND UP WITH ONE PORTION AND MICROSOFT WITH ANOTHER.

THE COURT: SO IT'S BOTH WAYS.

MR. GLITZENSTEIN: I BELIEVE IT IS. I BELIEVE IT IS.

AND THAT'S HOW I UNDERSTAND MR. MILLS' ANALYSIS.

AND SO THE -- THEY REALLY DO SORT OF -- THOSE DIFFERENT PIECES OF DR. WECKER'S SURVEY ARE USED IN SORT OF SEPARATE WAYS BY MR. MILLS.

BUT I THINK IT IS FAIR TO SAY THAT THE INCOME APPROACH IS ONE THAT REALLY DOES -- THE -- THE PREMISE OF THE INCOME APPROACH IS THAT MICROSOFT WOULD KNOW THAT 11.2 PERCENT OF ITS CUSTOMERS WOULD NOT HAVE PURCHASED THE SOFTWARE IF IT LACKED THESE TWO FUNCTIONALITIES, AND THEN MR. MILLS' REASONS FROM THAT PREMISE.

NOW, THE PREMISE IS WRONG, AND AS I EXPLAINED IN THE PREVIOUS MODULE, THE ANALYSIS IS WRONG. BUT THAT IS THE FRAMEWORK THAT MR. MILLS ADOPTS.

THE COURT: I GET IT.

MR. GLITZENSTEIN: SO REALLY JUST TO BREAK YOUR HONOR'S QUESTION DOWN, THE FIRST SORT OF MAJOR BULLET HERE OF THE SURVEY QUESTIONS AND THE FLAWS IN THE QUESTIONS THEMSELVES, THAT GOES TO BOTH OF THOSE USES THAT MR. MILLS MAKES.

THIS BULLET ON THE BOTTOM REGARDING THE CALIBRATION FACTOR, THAT ONE ONLY CONCERNS THE FIRST USAGE WHERE HE'S COMING UP WITH WILLINGNESS TO PAY DATA.

THIS SECOND BULLET DOES NOT CONCERN THE INCOME APPROACH AT ALL.

THE COURT: I UNDERSTAND.

MR. GLITZENSTEIN: ALL RIGHT. SO LET'S TURN TO 3.

SO I WANTED TO -- GIVEN SORT OF THE EMPHASIS THAT MR. MILLS PLACES ON THE ANSWER TO QUESTION 4, I WANTED TO START HERE ACTUALLY. THIS IS THE QUESTION THAT -- THERE'S AN ANALOGOUS ONE FOR GRAMMAR CHECK, SAME FORMAT, BUT THIS IS THE

QUESTION THAT MR. MILLS USES THE RESPONSES TO FOR THE INCOME APPROACH.

SO QUESTION 4 IS REALLY THE KEY FOR THAT WHOLE THEORY OF DAMAGES. SO THE QUESTION THAT WAS ASKED WAS, "SUPPOSE THE COMPONENTS INCLUDED THE USER-INITIATED SPELL CHECKER OPTION," SO THAT'S THE MANUAL WAY OF CHECKING SPELLING, "BUT DID NOT INCLUDE MICROSOFT'S CHECK SPELLING AS YOU TYPE OPTION (DISPLAY A RED-SQUIGGLY LINE AS YOU TYPE)."

AND THIS WAS PRECEDED, AS I'LL GET TO IN A MOMENT, THIS WAS PRECEDED BY MANY PAGES OF WHAT WE CONTEND ARE LEADING SORT OF PREVIEWS ON THE ISSUE OF THE SPELL CHECK FEATURE.

BUT I WANTED TO START WITH THE QUESTION SORT OF STANDING ALONE JUST TO DISSECT IT.

THEY ARE ASKING HERE ABOUT THE PARTICULAR FUNCTIONALITY THAT'S AT ISSUE IN THIS CASE. NOW, THAT FUNCTIONALITY GOES WELL BEYOND WHAT THEY CONTEND MICROSOFT -- OR THE PIECES OF THE FEATURES OR THE FUNCTIONALITIES THAT THEY CONTEND INFRINGE.

AND THIS IS REALLY A FUNDAMENTAL ISSUE. IT'S NOT THE CASE THAT THEY INVENTED A SPELL CHECK OR A GRAMMAR CHECK FUNCTIONALITY. I MEAN, WE HEARD, YOU KNOW, EXTENSIVE ARGUMENT EARLIER ON THE NON-INFRINGEMENT ISSUES, ALL OF WHICH CENTERS ON A FLAG THAT'S SET AND HOW THAT FLAG IS USED OR PROCESSED BY THE SYSTEM.

I'M NOT HERE TO SPEAK TO THOSE DETAILS. THAT'S WHY MR. LAMBERSON GETS THE HARD WORK.

BUT WHAT I DO KNOW IS THAT DISCUSSION NEVER TOUCHED ONCE ON THE BROAD NOTION OF CHECK SPELLING AS YOU TYPE. IN FACT, IT'S INTERESTING HERE, THE QUESTION, YOU KNOW, SORT OF HAS, AS A SHORTHAND FOR THIS CHECK SPELLING AS YOU TYPE OPTION, DISPLAY A RED SQUIGGLY LINE AS YOU TYPE.

WELL, THAT'S NOT WHAT THEY CONTEND INFRINGES. I MEAN, WHAT THEY CONTEND INFRINGES HAPPENS AFTER THAT RED SQUIGGLY LINE IS DRAWN.

SO HERE IS DR. WECKER ASKING PEOPLE NOT ONLY ABOUT THE FUNCTIONALITY AT A MACRO LEVEL, WITHOUT ANY EFFORT AT ALL TO DRILL DOWN TO THE THING THAT THEY SAY THEY INVENTED --

THE COURT: DOES DR. WECKER EVER EXPLAIN FROM WHERE HE GOT HIS NOTION OF WHAT THESE INVENTIONS WERE OR ANYTHING TO THAT EFFECT?

MR. GLITZENSTEIN: COUNSEL?

YEAH. IT'S IN HIS REPORT, I THINK PARAGRAPH 6 OR 7 OF HIS REPORT.

THE COURT: SO IT'S NOT LIKE HE TALKED TO DR. MADISETTI OR SOMEONE ELSE PURPORTING TO HAVE AN OPINION ABOUT SKILLED ARTISANS, THAT SORT OF THING?

MR. GLITZENSTEIN: NO. HE WAS ASKED TO SURVEY THE PREFERENCE FOR THIS FUNCTIONALITY, THE BACKGROUND CHECK FUNCTIONALITY RELATIVE TO THE FOREGROUND, OR MANUAL, FUNCTIONALITY.

SO, YOU KNOW, HE WAS NEVER SORT OF CHALLENGED TO COME UP

WITH QUESTIONS THAT WOULD ACTUALLY GET TO WHETHER THERE'S A USER PREFERENCE AT ALL.

WHATEVER THE USER PERCEIVED BENEFITS THAT THEY CONTEND THE INVENTION HAS, WHATEVER THOSE ARE, THAT'S WHAT HE SHOULD HAVE BEEN ASKING ABOUT.

YOU KNOW, JUST TO REALLY PUT A SHARP POINT ON THIS, AS I SAID, YOU KNOW, THE WHOLE -- THE TECHNOLOGY THAT MR. LAMBERSON EXPLAINED THIS MORNING FOR HOW THE SOFTWARE SORT OF IDENTIFIES THE STATE OF A GIVEN RANGE OF CHARACTERS AND THEN, WHERE THAT STATE IS 1, CHOOSES TO PUT A RED SQUIGGLY LINE UNDER IT, YOU KNOW, FULL STOP THERE. THERE'S NO ALLEGATION OF INFRINGEMENT FOR THAT PIECE OF THE SOFTWARE.

BUT I THINK, YOU KNOW, AS SORT OF COMMON EXPERIENCE HOLDS, THAT'S A PRETTY VALUABLE THING IN AND OF ITSELF, RIGHT? THAT, YOU KNOW, YOU'RE TYPING -- IT HAPPENS MAYBE FOR MANY PEOPLE IN THIS ROOM. YOU TYPE ALONG IN A DOCUMENT, AND MR. LAMBERSON USED THE EXAMPLE OF SENTIUS EARLIER AND IT GETS RED SQUIGGLED UNDERLINED IF YOU TYPE IT INTO YOUR BRIEF. THAT GIVES YOU VALUABLE INFORMATION.

AND, FRANKLY, IF YOU MISSPELL A WORD -- IF YOU TYPED, YOU KNOW, "COURT," OR WHAT DID WE USE, "JUMPED" AND YOU MISSED A LETTER, MANY PEOPLE ARE JUST GOING TO GO BACK AND CORRECT THAT MANUALLY WITHOUT REALLY EVER INVOKING THIS TABLE FUNCTIONALITY THAT YOU'VE HEARD ABOUT EARLIER.

SO FOR DR. WECKER TO SORT OF FOCUS PEOPLE --

THE COURT: I'M SORRY. I JUST WANT TO STOP YOU.

MR. GLITZENSTEIN: YEAH.

THE COURT: I THINK I HAVE YOUR POINT, BUT I WANT TO MAKE SURE I DO. YOU'RE SAYING RED SQUIGGLY LINES CAN OFFER UTILITY THAT GO FAR BEYOND THAT WHICH IS CLAIMED IN THE INVENTION. ONE USE CASE FOR THAT, RIGHT, WOULD BE WHERE ANYBODY FAMILIAR WITH THE ENGLISH LANGUAGE WOULD IMMEDIATELY UNDERSTAND WHAT THE CORRECTION WOULD BE, YOU'D BACK OUT THE CORRECTION, YOU'D MOVE ON. YOU'D NEVER USE THE LOOK-UP TABLE.

MR. GLITZENSTEIN: THAT'S RIGHT. BACKSPACE A COUPLE OF LETTERS AND FIX IT AND MOVE ON RATHER THAN MOVE YOUR CURSOR UP TO IT.

SO EVEN THAT SHORTHAND, I MEAN, THERE'S NOTHING IN THE CLAIMS THAT ARE ASSERTED HERE THAT HAVE A VISUAL INDICATION ELEMENT, FOR EXAMPLE. THERE'S NOTHING THAT WOULD BE TANTAMOUNT TO A SQUIGGLE. AND THEY DON'T POINT TO THE SQUIGGLE AS PART OF THEIR INFRINGEMENT CASE.

AND YET, THAT HAS INDEPENDENT VALUE TO THE USER OF THE SOFTWARE AND THAT'S WHAT DR. WECKER IS REALLY DIRECTING THE RESPONDENTS TO THINK ABOUT WHEN HE'S ASKING THIS CRITICAL QUESTION, HEY, WOULD YOU STILL HAVE PURCHASED MICROSOFT OFFICE?

FOR ALL WE KNOW, RESPONDENTS ARE SITTING THERE THINKING, BOY, I KIND OF LIKE IT WHEN I SEE THE PAGE ALL POPULATED WITH RED SQUIGGLES BECAUSE I CAN LOOK AT A GLANCE AND SEE, YEAH, THAT'S A NAME; OH, I GOT THAT ONE WRONG; OKAY, THAT'S A PLACE, AND IN AN INSTANT I KNOW WHERE MY ERRORS ARE WITHOUT EVER HAVING TO DO THE RIGHT CLICK PROCESS.

AND THAT'S JUST ONE EXAMPLE. I MEAN, AS WE SAID IN THE BRIEF, THERE'S ALSO ALL OF THE STUFF THAT HAPPENS AFTER THE USER RIGHT CLICKS AND THE TABLE IS CONSULTED, ET CETERA. I MEAN, WE CALL IT THE SPELL CHECK ENGINE, BUT THERE'S REAL TECHNOLOGY IN THERE THAT IDENTIFIES THESE WORDS.

YOU KNOW, AS WE PUT IN THE REPLY BRIEF, IT'S NOT AS THOUGH IT JUST TAKES THE FIVE WORDS THAT ARE CLOSEST TO THE MISSPELLING ON EITHER SIDE AND SAYS HERE YOU GO.

YOU KNOW, WHEN I DID DR. WECKER'S NAME, IT COMES UP WITH "SECKER" WITH AN "S." HOW DOES THE SOFTWARE KNOW TO LOOK TO A COMPLETELY DIFFERENT STARTING LETTER?

SOMETIMES YOU'LL SEE A WORD AND ONE OF THE SUGGESTIONS WILL BE TO SPLIT UP IN TWO WORDS, YOU'VE CONCATENATED TWO WORDS. HOW DOES THE SOFTWARE KNOW TO DO THAT? WELL, CLEARLY THERE'S A LOT OF TECHNOLOGY AND SCIENCE. THAT'S NOT WHAT THEIR INFRINGEMENT ALLEGATION IS DIRECTED TO.

AND YET, CLEARLY THE QUALITY OF THE SUGGESTIONS THAT THE SOFTWARE MAKES IS GOING TO IMPACT HOW PEOPLE PERCEIVE THE VALUE OF THE FEATURE.

AND THERE'S SIMPLY NO EFFORT, WITH THIS ONE BARE QUESTION, TO PROBE OR DISCERN ANYTHING ABOUT HOW PEOPLE ACTUALLY FELT ABOUT THE CLAIMED SUBJECT MATTER OR WHATEVER, YOU KNOW, SORT OF USER PERCEPTIBLE MANIFESTATIONS THERE ARE OF THE CLAIMED

SUBJECT MATTER.

THE COURT: SO WHAT ABOUT THAT TYPE OF ERROR, AS YOU DESCRIBE IT, OR PROBLEM RISES TO THE LEVEL OF A METHODOLOGICAL ISSUE THAT CAN'T EVEN BE PRESENTED TO THE JURY? WHERE DO I -- IN THE CONTEXT OF SURVEYS, I'VE STRUGGLED MORE BROADLY IN THIS CASE IN UNDERSTANDING WHERE THAT LINE GETS DRAWN.

MAYBE YOU CAN HELP ME OUT WITH THAT.

MR. GLITZENSTEIN: WELL, I THINK IT GOES BACK TO --

THE COURT: I'M SORRY. LET ME JUST OFFER ONE MORE THOUGHT AND THEN I WANT TO HEAR YOUR RESPONSE.

IT SEEMS TO ME IT CAN'T BE THE CASE THAT IF YOU CAN FIND ONE OR EVEN SEVERAL ERRORS IN THE WAY THE QUESTION IS ASKED IN ANY SURVEY, OR EVEN JUST RAISE QUESTIONS ABOUT IT, YOU HAVE TO THROW THE WHOLE SURVEY OUT.

SO YOUR CHALLENGE, I TAKE IT FROM YOUR PAPERS ESPECIALLY, IS MUCH MORE SERIOUS THAN THAT. SO HOW WOULD YOU HELP ME DRAW THAT LINE ON WHAT QUESTIONS CAN BE ADDRESSED IN CROSS-EXAMINATION AND WHAT QUESTIONS KEPT FROM THE JURY?

MR. GLITZENSTEIN: WELL, THIS IS FUNDAMENTALLY A METHODOLOGICAL ISSUE FOR ACTUALLY I THINK IT'S A FAIRLY SIMPLE REASON. THERE'S NO EVIDENCE IN THE RECORD AT ALL FROM THE SENTIUS SIDE TO SHOW THAT BUSINESS COMMERCIAL DECISIONS OF ANY MAGNITUDE, LET ALONE THE MAGNITUDE WE'RE TALKING ABOUT HERE, WOULD EVER BE BASED ON THIS TYPE OF QUESTION.

I MEAN, THAT'S A FUNDAMENTAL SHOWING ON THEIR PART THAT

JUST SIMPLY HASN'T BEEN MADE.

THE COURT: OKAY. SO WHAT YOU'RE SUGGESTING, AMONG OTHER TOOLS, IS TO SAY, ALL RIGHT, WELL, IS THE KIND OF PROBLEM OR ERROR THAT WE'VE IDENTIFIED, OR SETS OF PROBLEMS OR SETS OF ERRORS WE'VE IDENTIFIED, THE TYPE THAT WOULD RENDER THIS USELESS OR INVALID -- OR NOT VALUABLE TO THOSE WHO ACTUALLY MAKE BUSINESS DECISIONS ON THIS THING.

MR. GLITZENSTEIN: THERE'S NO FOUNDATION FOR --

(PAUSE IN PROCEEDINGS.)

THE COURT: GO AHEAD.

MR. GLITZENSTEIN: THERE'S NO FOUNDATION FOR, FOR THIS BEING AN APPROPRIATE QUESTION FOR A SURVEY OF THIS TYPE IS ONE WAY THAT I WOULD SAY IT.

BUT MORE TO THE POINT, I MEAN, THIS IS -- THE METHOD -- FOR A PATENT CASE, THE FAILURE IN THE METHODOLOGY HERE IS, IS THE FACT THAT THERE -- THEY'RE JUST SIMPLY NOT ENTITLED TO ASK QUESTIONS THIS BROADLY.

SO I THINK IT'S TWO-FOLD, RIGHT? I MEAN, IF YOU -- IF YOU WERE A COMPANY GOING INTO THE WORD PROCESSING BUSINESS AND YOU WANTED TO FIGURE OUT HOW TO PRICE YOUR SOFTWARE, YOU KNOW, IT WOULD BE ONE THING TO SAY, WELL, SHOULD WE PUT MONEY INTO, YOU KNOW, DEVELOPING A SPELL CHECK, YOU KNOW, FEATURE OR FUNCTION? HOW MUCH MONEY SHOULD WE INVEST IN IT?

I DON'T THINK YOU RELY ON THIS TYPE OF QUESTION FOR THAT ANSWER.

THE COURT: BUT THE --

MR. GLITZENSTEIN: BUT THAT'S NOT EVEN THE -- SORRY.

THE COURT: NO, NO. COMPLETE YOUR THOUGHT.

MR. GLITZENSTEIN: WELL, MY POINT IS THEY CAN'T -- THEY CAN'T ASK QUESTIONS -- NOT CAN'T.

FROM A METHODOLOGICAL PERSPECTIVE, THE ANSWER TO THIS QUESTION IS NOT PROBATIVE ON THE ISSUE THAT IS RELEVANT HERE.

THE COURT: SO WHAT I WAS ABOUT TO ASK, AND I THINK YOU'VE ANSWERED IT IN PART -- THAT'S WHY IT'S ALWAYS A GOOD IDEA TO LET LAWYERS FINISH THEIR THOUGHTS -- WAS IT SOUNDS LIKE WHAT YOU'RE SAYING IS -- WELL, YOUR CLIENT HAPPENS TO BE A GREAT EXAMPLE, SO I'LL JUST USE MICROSOFT. MICROSOFT HAS ALL KINDS OF PEOPLE IN PRODUCT MANAGEMENT WHO MAKE BUY/BUILD DECISIONS ON RELEASES ALL THE TIME, AT LEAST THAT WAS MY EXPERIENCE WAY BACK IN THE DAY.

AND SO THE QUESTION WOULD BE, IS THIS KIND OF INQUIRY, OR THIS KIND OF SURVEY QUESTION THAT'S USED IN THE LITIGATION THE KIND OF QUESTION THAT A REAL PRODUCT MANAGER WITH A REAL BOSS BEATING ON THEM TO PICK THREE FEATURES, NOT 12, FOR THE NEXT RELEASE TO USE. IS THAT ONE WAY TO THINK ABOUT THIS?

MR. GLITZENSTEIN: THAT IS ONE METHODOLOGICAL FLAW IN THE SURVEY. OKAY?

THE COURT: ALL RIGHT.

MR. GLITZENSTEIN: BUT EVEN MORE CRITICALLY, WHAT A -- WHAT ONE'S BOSS MIGHT BE INTERESTED IN AND THE LEVEL OF

SORT OF USER APPEAL THAT A FEATURE OR FUNCTION MIGHT HAVE IN A PIECE OF SOFTWARE IS A, IS A DIFFERENT QUESTION THAN THE TYPE OF QUESTION THAT A PATENT OWNER MUST ASK IF THEY'RE PUTTING A SURVEY FORWARD.

THE COURT: AND ONE RELATED QUESTION IF I COULD.

IS THAT THE -- IS THAT PROOF, THAT IS, PROOF EITHER THAT THIS TYPE OF RELIANCE IS MADE IN REAL WORLD SETTINGS, OR NOT, IS THAT SOMETHING THAT THE EXPERT AND THE EXPERT'S LAWYERS, THE PARTY -- OR THE PARTY OFFERING THE EXPERT TESTIMONY HAS THE BURDEN OF PROOF OF ESTABLISHING IS SOMETHING THAT'S DONE IN PRACTICE?

IN OTHER WORDS, YOU'RE RAISING THIS CHALLENGE, AND WHAT I'M WRESTLING WITH IS, WHO HAS THE BURDEN OF PROOF HERE THAT THESE ARE HOW IT'S DONE OR HOW IT'S NOT DONE?

MR. GLITZENSTEIN: IT'S -- IN THIS CASE, IT IS SENTIUS'S BURDEN. IT'S THE PROFFERING PARTY'S BURDEN. DAUBERT CLEARLY PUTS THAT OBLIGATION ON THEM.

I MEAN, THIS IS WHY THESE ISSUES ARE NOT -- I MEAN, I KNOW THE RESPONSE OF THIS IS -- WHY ISN'T THIS JUST GRIST FOR CROSS IS SORT OF REFLEXIVE FOR THE PARTY WHO'S RESISTING A MOTION LIKE THIS.

BUT THAT REALLY, YOU KNOW, REALLY MISUNDERSTANDS DAUBERT. I MEAN, IT IS -- IT IS A -- IT'S A PRIVILEGE, NOT A RIGHT, FOR A PARTY TO BE ABLE TO OFFER AN ESTEEMED EXPERT OF ANY SORT AND OFFER OPINIONS TO A JURY, AND THAT'S WHY THE BURDEN RESTS

SQUARELY ON THEIR SHOULDERS.

AND SO FOR SOMETHING LIKE THIS, I THINK THERE ARE -- THERE ARE TWO LEVELS. I MEAN, THERE'S THE FOUNDATIONAL ISSUE, WHICH IS THEY HAVEN'T SHOWN THAT A SURVEY OF THIS TYPE AND QUESTIONS LIKE THIS TYPE WOULD, IN FACT, BE USED FOR BUSINESS DECISIONS OF THE MAGNITUDE THAT THEY ARE SUGGESTING THIS WOULD BE USED FOR. THAT'S SORT OF A GLOBAL ISSUE.

THE COURT: THAT POINT IS REALLY THAT THERE'S -- THIS IS NO QUICK AND DIRTY EXERCISE WHERE YOU JUST NEED TO SORT OF DO A DIP STICK TEST ON YOUR CUSTOMER BASE.

THIS IS EQUIVALENT TO A MAJOR, BIG FIGURE INVESTMENT DECISION THAT WOULD REQUIRE FAR MORE RIGOR.

MR. GLITZENSTEIN: I'VE READ THE COURT'S OPINION IN THE APPLE/SAMSUNG DAUBERT MOTION FOR APPLE'S SURVEY EXPERT, AND THAT EXPERT HAD, AS I RECALL IT, 16 DIFFERENT PHONE CONFIGURATIONS AND THE SURVEY RESPONDENTS WERE -- THERE WAS SOME -- SOME PERCENTAGE OF THEM WOULD ACTUALLY, I GUESS, GET A PHONE OR GET PAYMENTS AND THINGS LIKE THAT TO REALLY INCENTIVIZE THEM TO FOCUS ON THE QUESTIONS THAT WERE BEING ASKED.

I MEAN, JUST AS I READ THAT CASE, I CAN ONLY, YOU KNOW, REALLY THINK ABOUT THE MANY DIFFERENCES BETWEEN THE SURVEY THAT'S DISCUSSED IN THAT OPINION, WHICH WAS THE SUBJECT OF AN EXTENSIVE DISCUSSION AND I DON'T KNOW HOW CLOSE IT WAS, SO TO SPEAK, BUT IT WAS -- THAT DIDN'T STRIKE ME AS BEING SORT OF A

SIMPLE QUESTION TO ANSWER EITHER FOR THAT COURT.

THE COURT: A FEW THINGS IN THAT CASE WEREN'T, YEAH.

MR. GLITZENSTEIN: THIS IS, THOUGH, FAR LESS, YOU KNOW, REFLECTIVE OF HOW PEOPLE ACTUALLY WOULD, WOULD ASK QUESTIONS.

IF WHAT YOU WERE REALLY INTERESTED IN WAS A NUMBER THAT YOU COULD, YOU KNOW, LITERALLY TAKE TO THE BANK -- I MEAN, THAT'S WHAT THEY'RE SAYING IS MICROSOFT AND SENTIUS WOULD HAVE PUT REALLY, YOU KNOW, HUNDREDS -- OVER A HUNDRED MILLION DOLLARS WORTH OF STOCK, SO TO SPEAK, IN THE RESULTS OF THIS SURVEY, AND IF THAT'S THE PURPOSE FOR WHICH THE SURVEY IS BEING PUT, IT REALLY IS INCUMBENT UPON THEM TO SAY, AND THAT, IN FACT, HAPPENS IN THIS BUSINESS OR IN ANY RELATED BUSINESS. AND THAT'S MISSING.

BUT I WANT TO RETURN JUST TO THE ISSUE OF THE, OF THE QUESTIONS THEMSELVES AND THE OVERBREADTH ISSUE BECAUSE I THINK THAT'S A SEPARATE ISSUE ACTUALLY AND I THINK THAT ONE IS EVEN MORE OF A BINARY ISSUE THAN THE FOUNDATIONAL POINT THAT I WAS JUST MAKING.

THERE ARE -- THERE ARE CASES, BOTH DISTRICT COURT CASES HERE ON SLIDE 4. THE FRACTUS CASE SORT OF GETS TO THE POINT THAT I'M TRYING TO MAKE HERE. IT'S GOT TO BE TIED DIRECTLY TO PLAINTIFF'S TECHNOLOGY, THE VALUE HAS TO BE TIED DIRECTLY TO PLAINTIFF'S TECHNOLOGY, AND IF NOT, IT CONFUSES THE ISSUE AND MUST BE EXCLUDED.

AND THEN, AGAIN, THE COURT IN APPLE V. SAMSUNG OBSERVED THAT IF THE DESCRIPTION VARIES SO MUCH FROM WHAT IS CLAIMED THAT THE SURVEY NO LONGER RELATES TO ANY ISSUE IN THE CASE AND IS NON-RELEVANT AND, ERGO, NON-HELPFUL, AND THE COURT GOES ON TO SAY, THEREFORE IT'S EXCLUDED.

SO THIS IS FUNDAMENTALLY A DAUBERT ISSUE. THE NOTION OF A QUESTION THAT IS NOT TIED TO THE CLAIMED SUBJECT MATTER IS FUNDAMENTALLY A DAUBERT ISSUE, AND THAT MAKES SENSE BECAUSE THE RISK HERE, BOTH ON A METHODOLOGY SIDE AND A JUROR CONFUSION SIDE, ARE SO GREAT THAT IT REALLY IS UP TO SENTIUS TO SHOW THAT THE QUESTIONS THAT THEY ASKED ARE THINGS THAT REALLY DRILL DOWN TO THE PIECES OF THE FEATURE THAT THEY SAY INFRINGE.

WE FIND SUPPORT ALSO FOR THIS IN LASERDYNAMICS. I KNOW THAT THIS IS AN ENTIRE MARKET VALUE RULE CASE, BUT, AGAIN, THE PRINCIPLE HERE IS PERFECTLY APPLICABLE TO THESE CIRCUMSTANCES WHERE IT'S VERY MUCH LIKE ASKING WHETHER CONSUMERS WOULD BUY THE SOFTWARE, OR NOT, WITHOUT THE ACCUSED FUNCTIONALITY AS IF THEY WOULD BUY A LAPTOP WITHOUT AN EXTENDED LIFE BATTERY.

THE COURT: THAT'S THE POINT YOU WERE MAKING EARLIER.

MR. GLITZENSTEIN: SAME POINT.

AND SO JUST AS THE COURT IN LASERDYNAMICS SAID THE FOCUS ALWAYS HAS TO REMAIN ON THE CLAIMED SUBJECT MATTER, THAT'S THE OBLIGATION FOR A SURVEY AS WELL. THEY JUST -- THEY CAN'T ASK CONSUMERS QUESTIONS ABOUT THE VALUE THEY PLACE ON A FEATURE WHERE MOST OF THAT FEATURE HAS NOTHING TO DO WITH THEIR CLAIM.

THAT QUESTION JUST SIMPLY ISN'T PROBATIVE ON THE, ON THE DAMAGES ISSUES BECAUSE IT SAYS NOTHING ABOUT WHAT CONSUMER PREFERENCE AND VALUE ARE FOR THE THING THAT THEY SAY IS THE INFRINGEMENT. AND THAT IS A, A FUNDAMENTAL DAUBERT FAILING.

ALL RIGHT. AMBIGUITY. I'VE TALKED ABOUT THE BOTTOM POINT HERE ON SLIDE 6.

BUT THERE'S A SEPARATE POINT HERE, TOO, WHICH IS JUST THE QUESTIONS, EVEN AT THE LEVEL OF SORT OF THE MACRO LEVEL OF ASKING PEOPLE IF THEY CARE ABOUT CHECK SPELLING AS YOU TYPE, THAT IS BROAD ENOUGH TO INCLUDE AUTO CORRECT, WHICH IS A WHOLLY SEPARATE AND NON-ACCUSED FEATURE OF MICROSOFT WORD, PRETTY VALUABLE ALSO WHERE PEOPLE TYPE ALONG AND T-E-H WILL AUTOMATICALLY GET CORRECTED TO T-H-E, FOR EXAMPLE, AND THERE'S A WHOLE HOST OF WORDS.

SO SOMEBODY READING THIS QUESTION AND MAYBE NOT PAYING ATTENTION TO THE SQUIGGLY LINE -- I DON'T KNOW BECAUSE THEY WEREN'T ASKED TO SORT OF PARSE THOSE OUT -- MIGHT READ THIS AND THINK, WELL, AUTO CORRECT IS PRETTY VALUABLE.

FRANKLY, A GOOD PERCENTAGE OF THE RESPONDENTS ACTUALLY TOOK THE SURVEY ON THEIR MOBILE DEVICE AND THE AUTO CORRECT IS PRETTY VALUABLE, AT LEAST I THINK A LOT OF PEOPLE FIND IT VALUABLE ON A MOBILE DEVICE WHERE YOU CAN'T EASILY SCROLL UP AND RIGHT CLICK AND EVERYTHING ELSE.

SO AUTO CORRECT IS A PRETTY IMPORTANT FEATURE THAT THIS QUESTION REALLY DIDN'T TAKE CARE TO SORT OF EXCLUDE FROM THE

QUESTION.

AND AT SOME POINT, YOU KNOW, THAT IS ALSO AN OBLIGATION ON A SURVEY TAKER TO SAY, WELL, HOLD IT, I'VE ASKED A QUESTION THAT WOULD BE A BIT OVERBROAD AND, THEREFORE, INFLATE THE, THE APPARENT VALUE OF THE FEATURE.

THE COURT: ALL RIGHT. LET ME STOP YOU THERE AND JUST TAKE A BRIEF RECESS HERE.

HUDDLE TIME, TEAM.

(DISCUSSION OFF THE RECORD BETWEEN THE COURT AND THE CLERK.)

THE COURT: ALL RIGHT. WELL, I HAVE A VERDICT IN MY JURY TRIAL, AND AS THE TRIAL LAWYERS ARE EAGER TO UNDERSTAND IT AND HEAR IT.

SO WITH YOUR INDULGENCE AND MY SINCERE APOLOGIES, I WANT TO HEAR THE REST OF THE ARGUMENT, BUT I JUST NEED TO TAKE A SHORT BREAK, TAKE THAT VERDICT, AND THEN WE'LL GET RIGHT BACK AT IT.

MR. GLITZENSTEIN: MUCH HIGHER PRIORITY, YOUR HONOR.

THE COURT: MR. RIVERA, WHY DON'T WE PROCEED TO BRING THE JURY IN.

(RECESS FROM 5:00 P.M. UNTIL 5:13 P.M.)

THE COURT: ALL RIGHT. WHY DON'T WE CONTINUE WITH, AGAIN, MY APOLOGIES FOR THE INTERRUPTIONS TODAY.

PLEASE.

MR. GLITZENSTEIN: THANK YOU, YOUR HONOR. WE'RE IN

THE HOME STRETCH.

SO MOVING SORT OF AWAY FROM THE ACTUAL PHRASING OF THE QUESTION THAT DR. WECKER ASKED THAT REALLY IS SO CRITICAL TO THE MILLS ANALYSIS, THE LEAD UP TO THAT QUESTION IS ALSO SOMETHING THAT VIOLATES JUST THE GENERAL ACCEPTED METHODOLOGY FOR CONDUCTING A SURVEY IN THAT THE QUESTIONS WERE LEADING.

YOU KNOW, ONE WAY THAT A SURVEY QUESTION CAN SORT OF PROBE AND EXPLORE THE IMPORTANCE OF FEATURES IS JUST TO SIMPLY ASK THE OPEN ENDED QUESTION, WHY DID YOU BUY THE PIECE OF SOFTWARE?

AND IF SORT OF THE UNPROMPTED AND UNAIDED RESPONSES TO THOSE QUESTIONS, YOU KNOW, SUGGEST OR ARE DIRECTED TO A PARTICULAR FEATURE, YOU KNOW, SOME CONCLUSIONS MIGHT BE DRAWN FROM THAT.

BUT THAT'S NOT WHAT THEY DID. THEY SPENT ABOUT FIVE PAGES OF SCREEN SHOTS GOING THROUGH SORT OF EXHAUSTIVELY OF WHAT THIS FEATURE IS, FOLLOWED IMMEDIATELY BY ASKING THE CRITICAL QUESTION THAT I DIRECTED THE COURT'S ATTENTION TO BEFORE THE RECESS.

SO THERE WAS SIMPLY NO CONTEXT OR FRAMING FOR THESE FEATURES IN THE CONTEXT OF THE SOFTWARE PROGRAMS AS A WHOLE, AND REALLY THAT'S A FUNDAMENTAL ISSUE WHEN THEY ARE -- THEY'RE POSITING HERE THAT PEOPLE WOULD ACTUALLY HAVE REFUSED TO PURCHASE THE ENTIRETY OF AN OFFICE SUITE WITH ITS MANY THOUSANDS AND THOUSANDS OF FEATURES SIMPLY BECAUSE IT LACKED TWO PARTICULAR FUNCTIONALITIES.

IF THAT'S THE QUESTION YOU'RE REALLY TRYING TO ANSWER FROM THE PERSPECTIVE OF FIGURING OUT HOW PEOPLE REALLY FEEL, YOU HAVE TO PUT THAT INTO SOME CONTEXT AND YOU HAVE TO FRAME THAT FOR THEM.

AND THEN, AGAIN, ONE OF MY SORT OF CORE OVERARCHING THEMES HERE IS IN THE THIRD BULLET, THAT THEY HAVE TO HAVE SOME FOUNDATION SHOWING THAT SURVEYS OF THIS TYPE ARE ACTUALLY USEFUL.

ALL RIGHT. AND THEN MOVING TO THE ISSUE OF QUALITY CONTROLS, AGAIN, MUCH OF THIS HAS BEEN DISCUSSED IN THE BRIEFS, SO I'LL BE BRIEF ON THIS.

THERE'S NO -- AS A MATTER OF METHODOLOGY, THERE IS NO DISPUTE THAT QUALITY CONTROLS ARE A PART OF THE GENERALLY ACCEPTED SURVEY METHODOLOGY AND, YOU KNOW, PARTICULARLY SO HERE WHERE YOU HAVE SORT OF THESE CHARACTERISTICS OF THE SURVEY. IT WAS AN OMNIBUS SURVEY WITH PAID RESPONDENTS ADMINISTERED OVER THE INTERNET. NONE OF THOSE ARE FATAL FLAWS.

THE OMNIBUS SURVEY CREATES CONCERNS FOR THE SURVEY EXPERT BECAUSE QUESTIONS FROM ONE SURVEY CAN INFLUENCE ANOTHER.

BUT THE FACT OF THE MATTER IS, WHEN QUESTIONS ARE POSED IN THIS FORMAT, THERE IS A GENERALLY ACCEPTED APPROACH OF DOING THINGS TO IDENTIFY, DETECT, AND REMOVE RESPONSES FROM PEOPLE WHO RACE THROUGH THE SURVEY.

ALSO, SURVEY PRACTICE FOR SURVEYS OF THIS SORT GENERALLY INVOLVE QUESTIONS TO IDENTIFY INATTENTIVENESS OR POOR

COMPREHENSION.

THERE'S JUST SIMPLY NOTHING IN THIS SURVEY TO FIGURE OUT IF PEOPLE REALLY UNDERSTOOD EVEN WHAT THEY WERE BEING ASKED BY ASKING TEST QUESTIONS ABOUT FICTIONAL PRODUCTS. MY PERSONAL FAVORITE IS THE HARVARD QUESTION, YOU KNOW, WHICH SAYS IF YOU'RE READING THIS QUESTION, ANSWER YES IN THE BLANK BELOW, AND IT'S INTERESTING TO ME HOW THAT IS EFFECTIVE AT FILTERING OUT PEOPLE WHO ARE NOT PAYING ADEQUATE ATTENTION TO THE SURVEY.

TURNING TO SLIDE 9, ON THE ISSUE OF SURVEYS, THEY -- THESE ARE THE ISSUES THAT SENTIUS, IN RESPONSE ON THIS QUALITY CONTROL, HAS IDENTIFIED AS THE ALLEGED MEASURES THAT WERE TAKEN TO ENSURE A HIGH QUALITY LEVEL OF RESPONSE AND, THEREFORE, RELIABILITY OF THE RESPONSES THEMSELVES.

AND THEY SAY, WELL, IN GENERAL, SENTIUS SAYS, IN GENERAL, ORC, WHICH IS THE ORGANIZATION THAT ADMINISTERED THE SURVEY FOR DR. WECKER, MAINTAINS A HIGH QUALITY SURVEY PANEL.

WELL, THAT DOESN'T REALLY SAY ANYTHING ABOUT THE RESPONSES TO THESE QUESTIONS. AND, AGAIN, I'VE IDENTIFIED PARTICULAR CONCERNS THAT, THAT ARE SORT OF APPARENT ON THE FACE OF THE QUESTIONS THEMSELVES IN TERMS OF AMBIGUITY AND SCOPE.

THE COURT: ACTUALLY, I -- SO ON THAT POINT, I READ YOUR BRIEF -- AGAIN, YOU MAY CROSS-EXAMINE THE HECK OUT OF THIS ISSUE AND OTHERWISE BRING ALL SORTS OF CHALLENGES, BUT FOR THE PURPOSES OF THIS MOTION, I DIDN'T SEE REALLY ANYTHING IN YOUR BRIEF THAT TOOK ISSUE WITH THE PANEL COMPOSITION, PER SE. DID

I JUST MISUNDERSTAND THAT?

MR. GLITZENSTEIN: NO. THAT'S CORRECT, YOUR HONOR. WE DON'T TAKE ISSUE WITH THE PANEL COMPOSITION. THERE WAS A DEMOGRAPHIC CHECK DONE. I SORT OF ADDRESS THAT IN MY LAST BULLET POINT.

AND SO ONE OF THE THINGS THAT DR. WECKER DID, AND WHAT HE POINTED TO WHEN I TOOK HIS DEPOSITION, HE SAYS, WELL, THE ANSWERS TO THE DEMOGRAPHIC QUESTIONS WERE MY CHECK BECAUSE WHEN I LOOK AT THOSE RESPONSES, I SEE THAT THEY ACTUALLY MIRROR THE DEMOGRAPHICS OF THE U.S. POPULATION AT LARGE.

AND ON DAUBERT, WE'RE NOT TAKING ISSUE WITH THE COMPOSITION OF THE PANEL.

THE COURT: THAT'S REALLY WHAT MY QUESTION WAS GETTING AT.

MR. GLITZENSTEIN: BUT AS A MATTER OF WHETHER THAT QUALIFIES AS A QUALITY CONTROL, NO, BECAUSE IT DOESN'T TAKE ANY EFFORT TO SAY WHAT YOUR DEMOGRAPHICS ARE. THAT'S NOT REALLY OUR COMPLAINT WITH THE METHODOLOGY THAT DR. WECKER EMPLOYED HERE.

THE ISSUE IS THESE ARE LONG QUESTIONS REQUIRING PEOPLE TO READ PAGES AND PAGES AND PAGES OF SCREEN SHOTS, TO PARSE THESE QUESTIONS AT A LEVEL WHERE, YOU KNOW, ARE THEY -- ARE THEY EVEN CLEAR WHAT THEY'RE BEING ASKED IN TERMS OF IS IT AUTO CORRECT? AM I BEING ASKED ABOUT THE SQUIGGLE? AM I BEING ASKED ABOUT THE RETRIEVAL OF SUGGESTED CORRECTIONS? NONE OF THAT IS CLEAR.

AND SO GIVEN THOSE, SORT OF THE AMBIGUITIES AND UNCERTAINTIES THAT ARE PRESENT ON THE FACE OF THE QUESTION, IT WAS ALL THE MORE IMPORTANT THAT SOMETHING BE DONE TO ENSURE THAT PEOPLE ACTUALLY UNDERSTAND THEM AND ARE TAKING THE APPROPRIATE AMOUNT OF TIME TO RESPOND TO THEM.

JUST ON THIS ISSUE OF THE OMNIBUS SURVEY, YOU KNOW, WE'D ASKED ABOUT THAT AFTER WE GOT DR. WECKER'S REPORT, AND THE MORNING OF HIS DEPOSITION, THEY TOLD US, WELL, THERE WERE QUESTIONS ASKED BEFORE THE QUESTIONS THAT DR. WECKER ASKED AND THEY WERE DIRECTED TO, I THINK, PEOPLE'S PREFERENCES FOR BEANS AND MAYBE AIRLINE RESERVATIONS OR AIRLINES, SOMETHING LIKE THAT.

BUT I WOULD SUBMIT THAT JUST THOSE QUESTIONS REALLY -- WE HAVEN'T BEEN PROVIDED WITH THOSE QUESTIONS. BUT EVEN AS THEY'VE BEEN EXPLAINED TO US, THEY CERTAINLY SUGGEST A LEVEL OF QUESTIONING THAT IS FAR LESS SORT OF THOUGHT INTENSIVE THAN THE QUESTIONS THAT DR. WECKER ASKED.

AND SO HE'S ASKING PEOPLE TO REALLY READ AND UNDERSTAND AND THEN PARSE THESE AMBIGUOUS QUESTIONS, AGAIN, ALL THE MORE REASON WHY HE NEEDED TO HAVE SOME SORT OF QUALITY CONTROLS.

SO THEIR OTHER RESPONSE IS -- SO JUST HAVING A HIGH QUALITY PANEL, THAT'S A STARTING POINT.

BUT IT DOESN'T --

THE COURT: IT'S NECESSARY, BUT IT'S NOT SUFFICIENT.

MR. GLITZENSTEIN: PERFECT -- PERFECTLY SAID, YOUR

HONOR. YES.

AND SO I'M ON TO THE SECOND BULLET, THE TIMING ISSUE. THIS IS A CLASSIC METRIC THAT SURVEY TAKERS WILL USE TO IDENTIFY RACERS, WHICH ARE A BIG PROBLEM FOR PEOPLE IN THIS FIELD. THEY TIME THE WHOLE SURVEY, OKAY?

WELL, THAT DOESN'T TELL US ANYTHING ABOUT DR. WECKER'S PORTION OF THE SURVEY.

THEIR RESPONSE TO THAT IS, WELL, IF SOMEBODY IS RACING THROUGH THE WHOLE SURVEY, THAT WOULD GET PICKED UP AND THEY'RE JUST AS LIKELY TO RACE THROUGH DR. WECKER'S PORTION AS EVERYTHING ELSE.

WELL, NOT IF THEY'RE BEING ASKED ABOUT BEANS AND AIRLINES IN THE FIRST INSTANCE, AND THEN HAVE THIS SORT OF VERY COMPLEX SET OF QUESTIONS IN THE VERY NEXT INSTANCE.

SO IT WOULD HAVE BEEN RELATIVELY STRAIGHTFORWARD TO EMPLOY A VERY -- YOU KNOW, SORT OF A WELL ACCEPTED APPROACH OF JUST SIMPLY TIMING HOW LONG IT TOOK PEOPLE TO RESPOND TO HIS QUESTIONS.

AND THEN LASTLY, THEY SAY, WELL, WE DID SOME IN-HOUSE TESTING, BUT THAT WASN'T AT ALL REPRESENTATIVE. THAT WAS JUST SORT OF AROUND THE WATER COOLER TYPE STUFF WHERE THEY ASKED THEIR COLLEAGUES TO ANSWER SOME OF THESE QUESTIONS.

AND AS WE SAY IN THE BRIEF, YOU'RE GOING TO TAKE A LOT MORE CARE IN THAT SETTING WHEN YOUR BUSINESS COLLEAGUE IS ASKING THE QUESTION THAN IF YOU'RE ON-LINE CLICKING A FEW

BUTTONS WHERE YOU GET A REWARD, BUT ONLY WHEN YOU'RE DONE.

ALL RIGHT. LAST ISSUE, AND THIS IS THE, THE NOT -- NOT THE QUESTION 4 THAT I STARTED OUT WITH. THIS WAS ACTUALLY QUESTION 6 -- I THINK IT WAS 6 -- WHICH WAS AN OPEN-ENDED QUESTION WHERE HE ASKED PEOPLE ABOUT THEIR WILLINGNESS TO PAY FOR THE ACCUSED INSTRUMENTALITIES.

SO IT SUFFERS FROM ALL THE SAME AMBIGUITY PROBLEMS AND OVERBREADTH PROBLEMS THAT I ADDRESSED EARLIER WITH QUESTION 4.

BUT I WANTED TO FOCUS ON THIS LAST SLIDE ON JUST WHAT DR. WECKER DOES TO PROCESS THE RESULTS HE GOT.

AND HE DOESN'T DISAGREE THAT THOSE RESPONSES OVERSTATE THE WILLINGNESS TO PAY. THAT'S CALLED HYPOTHETICAL BIAS. PEOPLE ARE ASKED A HYPOTHETICAL QUESTION IN SORT OF AN ABSTRACT CONCEPT.

THE LITERATURE ACCEPTS AND DR. WECKER ACCEPTS THAT YOU'RE GOING TO GET A NUMBER THAT'S TOO HIGH, TOO HIGH. SO THAT'S THE BASELINE, WE ALL AGREE. THE QUESTION IS WHAT TO DO ABOUT IT.

AND REALLY THE ISSUE ON THIS COMES DOWN TO THE CALIBRATION THAT DR. WECKER APPLIED, AND I THINK THIS IS REALLY BREAD AND BUTTER DAUBERT MATERIAL HERE WHERE HE APPLIES A CALIBRATION FACTOR OF 1.46.

AND WHAT'S INTERESTING IS HE'S -- HE DERIVES THAT FROM AN ARTICLE WHERE THE RANGE OF CALIBRATION FACTORS IS QUITE STRIKING. SO THIS WAS A, AN ARTICLE THAT SUMMARIZES 26 OR SO OTHER SURVEYS WHERE THEY ACTUALLY DID DO THE WORK TO FIGURE OUT

WHAT THE ACTUAL CALIBRATION FACTOR WAS FOR THOSE PRODUCTS, AND IF YOU SEE THE RANGE HERE OF .8 TO 28.2 WHERE, YOU KNOW, YOU TAKE THAT CALIBRATION FACTOR AND YOU DIVIDE IT INTO THE STATED WILLINGNESS TO PAY. I MEAN, THERE IS, WHAT, NOT QUITE TWO ORDERS OF MAGNITUDE, BUT IT'S APPROACHING TWO ORDERS OF MAGNITUDE IN THAT RANGE ALONE, IMMEDIATELY SUGGESTING, JUST FROM THE DATA, THAT YOU CAN'T DRAW A RELIABLE CONCLUSION.

AND, IN FACT, THIS -- THERE'S BEEN A SERIES OF PAPERS DEALING WITH THIS AND I CHRONICLE THEM IN THE BRIEF, SO I WON'T REPEAT THEM HERE.

BUT ONE OF THE MORE RECENT ONES IS THIS 2005 MURPHY PAPER, AND I THINK WHAT'S TELLING ABOUT THIS IS THE CONCLUSION SAYING THERE'S NO CONSENSUS ABOUT EITHER THE CAUSE OR WAY TO CALIBRATE SURVEY RESPONSES FOR IT.

THE COURT: SO I NOTICED THAT IN MURPHY, AND I HAVE ONE QUESTION, PERHAPS MY LAST QUESTION FOR YOU BEFORE I TURN TO MR. ARD.

THAT WOULD SUGGEST, RIGHT, THAT BECAUSE THERE IS NO CONSENSUS ON HOW TO CALIBRATE, YOU SHOULDN'T CALIBRATE; AND IF YOU CAN'T CALIBRATE, YOU REALLY CAN'T CORRECT ANY SURVEY.

SO DOESN'T THAT PERHAPS OVERSTATE THE POINT, OR OVER -- OR PERHAPS PROVE TOO MUCH AND THAT PERHAPS, YOU KNOW, IF I TAKE THAT TO HEART, I SHOULDN'T ALLOW ANY SURVEY IN ANY KIND OF CASE?

MR. GLITZENSTEIN: WELL, I DON'T -- I DON'T THINK I'M

ON THAT SLIPPERY SLOPE, YOUR HONOR, BECAUSE I THINK THAT THERE ARE WAYS TO POSE THE QUESTION ABOUT WILLINGNESS TO PAY THAT DON'T PRESENT THESE HYPOTHETICAL BIASES.

THE COURT: SUCH THAT THERE WOULD BE NOTHING TO CALIBRATE?

MR. GLITZENSTEIN: THAT'S RIGHT. BECAUSE WHAT THESE STUDIES USE, AND YOU SEE THIS IN THE MURPHY PAPER, THERE'S ALSO A DISCUSSION OF IT IN THE, I THINK IT'S THE WELLS ARTICLE THAT THEY CITE IN THEIR OPPOSITION AND WE ADDRESS IN OUR REPLY, YOU CAN DO A BENCHMARK.

SO THE WAY THEY DERIVE THESE CALIBRATION FACTORS IS THEY WILL DO SORT OF A MORE ROBUST SURVEY TO GET A MORE -- A HIGHER CONFIDENCE NUMBER, AND I BELIEVE -- AND I'M NOT AN EXPERT ON THIS, YOUR HONOR -- BUT I BELIEVE THAT IT'S A SURVEY TECHNIQUE WHERE PEOPLE ARE GIVEN ACTUAL CHOICES INVOLVING ACTUAL DOLLARS THAT THEY THEN USE AND SORT OF SPEND TO MAKE THESE PURCHASE DECISIONS, AND SO THAT IS A MORE BONA FIDE REFLECTION OF WHAT THEIR TRUE WILLINGNESS TO PAY IS IF IT REALLY IS A ZERO SUM GAME AND REALLY IS NOT MONEY OUT OF THEIR POCKET, BUT MONEY THAT THEY HAVE TO SPEND TO ANSWER THE QUESTION.

THE COURT: SO HERE'S 49.95, OR WHATEVER THE RETAIL PRICE IS, AND A BASKET OF FEATURES. HAVE AT IT AND TELL US HOW YOU'D ALLOCATE THAT MONEY.

MR. GLITZENSTEIN: AND YOU'RE GIVEN MONEY TO SPEND ON THESE PRODUCTS AND HOW YOU CHOOSE TO SPEND YOUR MONEY IS A

REFLECTION OF YOUR WILLINGNESS TO PAY AND THAT'S ONE OF THE SO-CALLED BENCHMARKS TO USE. SO THERE ARE TECHNIQUES OUT THERE.

AND AGAIN, SORT OF DRAWING BACK TO MY OVERALL THEME, IF THE HYPOTHESIS IS YOU'RE GOING TO DO A SURVEY WHERE THE RESULTS OF THAT SURVEY ARE GOING TO BE USED TO MAKE, YOU KNOW, MULTI MILLION DOLLARS COMMERCIAL DECISIONS, YOU START TO LOOK MORE TO THE BENCHMARK TYPE APPROACH THAN THE CALIBRATION APPROACH.

I MEAN, THIS IS SOMETHING WHERE, YOU KNOW, IF YOU'RE LOOKING FOR SOMETHING -- YOU KNOW, IF YOU'RE LOOKING FOR INFORMATION ABOUT WHETHER YOU SHOULD GO SPEND THE MONEY TO CONDUCT A REAL SURVEY, MAYBE YOU DO SORT OF A QUICK AND DIRTY SURVEY TO GIVE YOU THAT SENSE.

BUT YOU CAN'T DRAW ANY REAL MEANINGFUL CONCLUSIONS OF THE SORT, AND CERTAINLY NOT OF THE PRECISION, THAT DR. WECKER DERIVES -- OR THAT HE OPINES ON IN HIS REPORT.

THE COURT: I SAID I ASKED MY LAST QUESTION OF YOU, BUT I'LL TAKE THE LIBERTY OF ASKING ONE MORE WITH MY APOLOGIES.

SO LET'S ASSUME I FIND SOME MERIT TO SOME OF THESE ARGUMENTS. INVARIABLY, IN ALL DAUBERT MOTIONS, THERE'S THE FOLLOW-ON QUESTION AS TO WHAT DO WE DO ABOUT THIS? I.E., DO I SIMPLY TAKE WECKER OUT? DO I TAKE A PIECE OF WECKER OUT? DO I DO EITHER OF THOSE THINGS? OR DO I GIVE SENTIUS THE OPPORTUNITY TO FIX THE PROBLEM?

MR. GLITZENSTEIN: WELL, THE FLAWS THAT WE'VE

IDENTIFIED, IF YOUR HONOR AGREES THAT THEY'RE FLAWS, ARE SO DEEPLY ROOTED THAT THERE'S -- I DON'T SEE ANYTHING IN THE WECKER SURVEY RESULTS THAT ARE SALVAGEABLE.

THE -- AND AS FOR THE CONSEQUENCES OF THAT, I MEAN, WE'RE LESS THAN A MONTH AWAY FROM TRIAL. WE'VE ACTUALLY SPENT A SIGNIFICANT AMOUNT OF TIME AND WE DID HIRE A SURVEY EXPERT WHO IS -- YOU KNOW, HE CONDUCTS THESE TYPES OF SURVEYS. HE SPENT A LOT OF TIME SORT OF CRITIQUING THIS SURVEY.

I'VE TAKEN DR. WECKER'S DEPOSITION AT SORT OF GREAT EFFORT AS WELL.

SO, I MEAN, I WOULD SUBMIT THERE ARE NO SURPRISES HERE IN ANYTHING THAT WE'RE ARGUING. THE LITERATURE THAT WE'RE POINTING TO IS OLD LITERATURE. THE CASE LAW THAT WE'RE POINTING TO IS AUTHORITY THAT EXISTED FOR SOME TIME.

THERE ARE WAYS TO DO THESE SURVEYS THAT ARE, YOU KNOW, LESS SUSCEPTIBLE TO THESE SORTS OF BROAD BASED CHALLENGES.

THE COURT: ALL RIGHT. I THINK I HAVE IT. THANK YOU VERY MUCH.

MR. ARD, YOU MAY PROCEED. GO AHEAD.

MR. ARD: GOOD EVENING, YOUR HONOR.

THE COURT: GOOD EVENING.

MR. ARD: SETH ARD, SUSMAN GODFREY, ON BEHALF OF SENTIUS.

FIRST, IT MAY BE WORTH NOTING THAT THEY DON'T CITE A SINGLE CASE SUPPORTING EXCLUSION OF A SURVEY EXPERT FOR ANY OF

THE GROUNDS THAT THEY'VE ARGUED HERE OR IN THEIR BRIEFING. THERE'S NOTHING, NO CASES.

THE COURT: I BROUGHT UP DR. WECKER'S EARLIER WORK. HE WAS, FOR EXAMPLE, PERMITTED TO TESTIFY IN THE LUCENT CASE.

MR. ARD: YEAH. THE FEDERAL CIRCUIT SAID THAT THEY RELIED ON HIS DESCRIPTION OF WHAT HE SAID.

THE COURT: I'M SORRY, I4I. I TAKE YOUR POINT. GO AHEAD.

MR. ARD: AN EXAMPLE, WHICH I WASN'T GOING TO TALK ABOUT FIRST BUT I MIGHT AS WELL BECAUSE IT WAS FEATURED SO PROMINENTLY IN THE ARGUMENT, IS A CLAIM THAT THEY MAKE IN THEIR REPLY BRIEF, WHICH IS THAT MICROSOFT SAYS THAT SENTIUS MUST SHOW THAT A SURVEY WITH THE SAME TYPE OF QUESTIONS, WITH THE SAME TYPE OF PRODUCTS, WITH THE SAME QUALITY CONTROLS, WITH THE SAME PANEL HAS BEEN ACCEPTED AND USED IN MULTI MILLION DOLLAR BUSINESS DECISIONS.

THEY PUT FORWARD THAT TEST IN THEIR REPLY BRIEF TEN DIFFERENT TIMES. I COUNTED. OKAY? NEVER A CITE TO A SINGLE CASE SUPPORTING IT. THERE'S NO CITES. NO CASE AUTHORITY. IT'S NOT THE LAW.

THERE'S NO LEGAL PRINCIPLE THAT SAYS THAT SURVEYS HAVE TO BE BETTER WHEN THE CASE INVOLVES A LOT MUCH MONEY. THEY DON'T CITE ANY AUTHORITY FOR THAT. IT'S NOT THE LAW.

THERE'S NO LEGAL PRINCIPLE THAT SAYS THAT EXPERTS MUST ONLY USE TECHNIQUES, SURVEY TECHNIQUES WHOSE EXACT CONTOURS

HAVE BEEN APPROVED IN OTHER CASES OR BY OTHER EXPERTS. THAT'S CONTRARY TO BASIC DAUBERT LAW.

AS JUDGE KOH, IN FACT, EXPLAINED IN THE APPLE V. SAMSUNG CASE WHERE HE (SIC) SAID DAUBERT AND ITS PROGENY SPECIFICALLY CONTEMPLATES THE ADMISSION OF EXPERT OPINIONS IN NEW FIELDS, AS LONG AS SUCH OPINIONS ARE ROOTED IN THE METHODOLOGY GENERALLY ACCEPTED IN THE SCIENTIFIC FIELD.

AND MICROSOFT'S MADE UP RULE THAT YOU HAVE TO SHOW THAT A PARTICULAR -- THAT THIS EXACT KIND OF SURVEY HAS BEEN USED IN MULTI MILLION DOLLAR BUSINESS DECISIONS IS ALSO CONTRARY TO A WHOLE HOST OF NINTH CIRCUIT DECISIONS ON WHAT YOU NEED TO DO TO GET PAST DAUBERT ON A -- FOR A SURVEY EXPERT.

SO LET ME JUST START WITH THAT, SOME OF THE BASIC LAW.

THE STANDARD TO EXCLUDE A SURVEY IN THE NINTH CIRCUIT IS EXTRAORDINARILY HIGH, AND THERE'S A LONG STRING OF CASES ON THIS WHICH MICROSOFT DOESN'T ADDRESS. THE BASIC STANDARD IS THAT A SURVEY IS OKAY AND IT'S ADMISSIBLE AS LONG AS IT'S CONDUCTED ACCORDING TO GENERALLY ACCEPTED PRINCIPLES AND IS RELEVANT. THAT'S THE BASIC PRINCIPLE, OKAY?

AND THE CASES IN THE NINTH CIRCUIT, AND IN THE NORTHERN DISTRICT OF CALIFORNIA AND ELSEWHERE, INTERPRETING THAT STANDARD SHOW HOW LOW THE THRESHOLD IS TO GET A SURVEY TO THE JURY, RIGHT? THE POINT THE NINTH CIRCUIT MAKES AGAIN AND AGAIN IS THAT ALL THESE POINTS THAT MICROSOFT IS RAISING, THAT'S FOR CROSS-EXAMINATION. OKAY?

SO LET ME JUST GIVE YOU A FEW CASES. ALL THESE CASES ARE CITED IN OUR BRIEF, BUT WE DON'T DESCRIBE THE UNDERLYING FACTS OF THESE CASES AND I JUST WANT TO WALK THROUGH THEM A LITTLE BIT BECAUSE I THINK IT --

THE COURT: AND I TAKE IT, FROM THE CITATIONS I DID SEE, SURVEYS ARE A RELATIVELY NEW FEATURE OF PATENT LITIGATION, SO MANY, IF NOT MOST OF THESE CASES, ARE ACTUALLY TALKING ABOUT SURVEYS IN OTHER CONTEXTS.

MR. ARD: RIGHT. AND MOST OF THEM ARE ACTUALLY TRADEMARK INFRINGEMENT CASES.

THE COURT: SOURCE CONFUSION AND THAT SORT OF THING?

MR. ARD: RIGHT. BUT THE NINTH CIRCUIT IS APPLYING THE SAME LAW FOR DAUBERT AND SURVEY EVIDENCE IN A DIFFERENT CONTEXT.

THE COURT: STILL RULE 703.

MR. ARD: RIGHT.

SO THE FIRST IS WELLS FARGO DECISION CITED ON PAGE 18 OF OUR BRIEF WHICH REJECTED A DAUBERT MOTION AS QUALIFYING AN EXPERT IN A TRADEMARK INFRINGEMENT CASE.

IN THAT CASE, THE COURT FOUND THAT THE SURVEY FOCUSSED ON LIKELIHOOD OF CONFUSION BETWEEN THE WRONG BRANDS AND IT FAILED TO ESTABLISH RESPONDENTS HAD CONTROL OF THE PURCHASING DECISIONS.

BUT THE COURT ADMITTED THE SURVEY ANYWAY. THE COURT EXPLAINED, THE NINTH CIRCUIT HAS HELD ON MULTIPLE OCCASIONS

THAT CHALLENGES TO SURVEY METHODOLOGY BEAR ON THE WEIGHT OF THE EVIDENCE, NOT ITS ADMISSIBILITY.

IN THE NINTH CIRCUIT'S FORTUNE DYNAMIC DECISION, WHICH IS ALSO CITED ON PAGE 18 IN OUR BRIEF, BUT CANDIDLY, WE DON'T GO INTO THE FACTS BUT I THOUGHT IT'S HELPFUL FOR THE COURT TO HEAR ABOUT THEM A LITTLE BIT, THE COURT REVERSED A DISTRICT COURT'S EXCLUSION OF A SURVEY EXPERT IN A TRADEMARK INFRINGEMENT CASE AND LAMENTED THAT THE COURT DIDN'T CITE THE LONG LINE OF NINTH CIRCUIT CASE SAYING THAT SURVEY EVIDENCE IS GENERALLY ADMISSIBLE.

IN THAT CASE, THE NINTH CIRCUIT AGREED THAT, QUOTE, "THE SURVEY HAD A NUMBER OF SHORTCOMINGS, INCLUDING THE FACT THAT IT WAS CONDUCTED OVER THE INTERNET, THEREBY FAILING TO REPLICATE REAL WORLD CONDITIONS, IT MAY HAVE BEEN SUGGESTIVE, AND IT QUITE POSSIBLY PRODUCED COUNTERINTUITIVE RESULTS."

BUT THE COURT FOUND THE SURVEY WAS NEVERTHELESS ADMISSIBLE BECAUSE, QUOTE, "THESE CRITICISMS, VALID AS THEY MAY BE, GO TO ISSUES OF METHODOLOGY, SURVEY DESIGN, RELIABILITY, AND CRITIQUE OF CONCLUSIONS AND THEREFORE GO TO THE WEIGHT OF THE SURVEY RATHER THAN ADMISSIBILITY."

IN APPLE V. SAMSUNG, WHICH WE CAN DISCUSS A LITTLE BIT MORE IN A MINUTE, THE COURT TWICE HELD THAT, QUOTE, "THE DISSATISFACTION WITH THE DESCRIPTION OF THE PATENTED FEATURES IN THE SURVEY GOES TO WEIGHT, NOT ADMISSIBILITY."

NOW, JUDGE KOH DID RECOGNIZE A POSSIBLE EXCEPTION WHEN A

DESCRIPTION OF THE PATENTED FEATURES VARIES SO MUCH FROM WHAT IS CLAIMED THAT THE SURVEY NO LONGER RELATES TO ANY ISSUE IN A CASE.

SO IF IT CAN'T RELATE TO ANY ISSUE IN THE CASE, A VERY LOW STANDARD WHICH IS EASILY MET HERE AS WE'LL DISCUSS IN A MINUTE.

IN SOUTHLAND SOD, CITED IN OUR BRIEF, I DON'T REMEMBER WHERE, BUT EARLY IN OUR BRIEF, THE NINTH CIRCUIT HELD THAT, QUOTE, "UNLIKE NOVEL SCIENTIFIC THEORIES, A JURY SHOULD BE ABLE TO DETERMINE WHETHER" EXCERPTED -- SORRY -- "WHETHER ASSERTED TECHNICAL DEFICIENCIES UNDERMINE A SURVEY'S PROBATIVE VALUE."

AND IN THAT CASE, THE COURT HELD THAT A DAUBERT CHALLENGE OF A SURVEY ASKED, QUOTE, "LEADING QUESTIONS," WHICH, AS YOU KNOW, THEY HAVE THREE SLIDES ON THIS, GOES ONLY TO THE WEIGHT AND NOT THE ADMISSIBILITY OF THE SURVEY.

FINALLY, IN HARTLE V. FIRST ENERGY, WHICH IS NOT FROM THIS DISTRICT, A FEDERAL COURT IN PENNSYLVANIA RECENTLY REJECTED A DAUBERT CHALLENGE OF A SURVEY EXPERT IN A PATENT CASE, NOTING THAT EXPERTS RELY ON SURVEYS IN A VARIETY OF CONTEXTS, AND COURTS GENERALLY ACCEPT RELIABLE SURVEY EVIDENCE.

IN THAT CASE -- SORRY, IT'S NOT A PATENT CASE. BUT IN THAT CASE, THE EXPERT CONDUCTED THREE CONTINGENT VALUATION SURVEYS, RIGHT, WHICH IS KIND OF SIMILAR TO THE KIND OF STUFF THEY'RE COMPLAINING ABOUT HERE, WHERE HE USED THE, YOU KNOW, WHAT THEY CALL THE DIRECT METHOD WHERE YOU ASK SOMEBODY HOW MUCH WOULD YOU BE WILLING TO PAY? THEY ASKED THEM, HOW MUCH

WOULD YOU BE WILLING TO PAY FOR A HOUSE NEAR CERTAIN KINDS OF POLLUTION, RIGHT? AND THEY USED TO ASSESS DIMINUTION OF VALUE IN THE HOUSES.

IN REJECTING THE DAUBERT CHALLENGE THERE, THE COURT EXPLAINED THE DEFENDANT'S ARGUMENT WITH RESPECT TO HYPOTHETICAL BIAS, THE EXACT THING THEY'RE COMPLAINING ABOUT AT LENGTH, AND INCONSISTENT AND UNCONVENTIONAL STATISTICAL ANALYSES ARE TECHNICAL FLAWS THAT GO TO WEIGHT, NOT ADMISSIBILITY.

SO A LONG STRING OF CASES SAYING THE SAME THING, THAT ALL OF THESE ISSUES THAT MICROSOFT IS COMPLAINING ABOUT HERE ARE FERTILE GROUNDS FOR CROSS-EXAMINATION. THEY'RE NOT GROUNDS FOR EXCLUSION OF AN EXPERT.

THE COURT: I THINK ONE OTHER CASE YOU RECENTLY BROUGHT TO MY ATTENTION WAS FROM JUDGE PAYNE, RIGHT? HE SAID THE SAME THING.

MR. ARD: EXACTLY, RIGHT, IN REJECTING NEARLY IDENTICAL ARGUMENTS THAT MICROSOFT IS MAKING HERE, THAT THEY'RE LEADING QUESTIONS AND INFLATED TO THE VALUE OF THE FEATURES AND OF COURSE THAT GOES TO WEIGHT, NOT ADMISSIBILITY, AND THE LIKE.

SO HERE THE SURVEY WAS CONDUCTED ACCORDED TO ACCEPTED PRINCIPLES, YOU KNOW, WITHIN THE MEANING OF THE NINTH CIRCUIT LAW BECAUSE IT'S A SIMPLE SAMPLE SURVEY THAT, THAT ESTIMATED THE PORTION OF PURCHASERS OF OFFICE WHO WOULD HAVE BOUGHT OFFICE WITHOUT THE ACCUSED FEATURES, FOR EXAMPLE. RIGHT?

ASKED THAT QUESTION TO A RANDOM SET OF PEOPLE AND THEN

DR. WECKER USED SIMPLE SAMPLE SURVEY METHODS TO THEN, YOU KNOW, ESTIMATE THE PROPORTION OF UNITED STATES CITIZENS THAT WOULD ANSWER THE SAME WAY, TO 95 PERCENT CONFIDENCE.

THAT'S THE METHOD. THAT'S THE METHOD THAT THEY'RE COMPLAINING ABOUT. THAT'S ACCEPTED.

THAT'S ALL YOU NEED UNDER THE NINTH CIRCUIT LAW TO ALLOW THIS TO GET TO THE JURY.

MICROSOFT'S CRITIQUES OF IMPROPER WORDING, HYPOTHETICAL BIAS, LEADING AND SUGGESTIVE QUESTIONS ARE TECHNICAL FLAWS THAT BEAR ON THE WEIGHT OF THE EVIDENCE, NOT THE ADMISSIBILITY. THAT'S WHAT ALL OF THOSE CASES HOLD.

SO LET ME JUST WALK THROUGH THEN QUICKLY SOME OF THE ARGUMENTS THAT MICROSOFT HAS MADE TODAY, WHICH DIFFER SLIGHTLY FROM THE BRIEFING, BUT LET ME JUST TRY TO HANDLE THAT ANYWAY.

SO HE ASKED THE RIGHT QUESTIONS. HE -- THE SURVEY ASKED ABOUT THE INCREMENTAL VALUE OF THE INFRINGING FEATURES ABOVE THE BEST NON-INFRINGING ALTERNATIVES, OKAY, AND MICROSOFT SEEMS TO -- WELL, THEY GAVE YOU A HIGHLY MISLEADING SLIDE, OKAY? THEY GAVE YOU A SLIDE THAT SHOWED YOU THE QUESTION THAT ASKED ABOUT WOULD YOU PURCHASE A PRODUCT WITHOUT BACKGROUND SPELL CHECK, OR CHECK SPELLING AS YOU TYPE -- WHICH IS MICROSOFT'S WORD BY THE WAY. CHECK SPELLING AS YOU TYPE, WE GOT THAT FROM THEM.

BUT THEY DIDN'T SHOW YOU THE SLIDE THAT DESCRIBES THE FEATURE, OKAY, AND THAT'S THE PRECEDING SLIDE.

AND WITH YOUR INDULGENCE, I ACTUALLY HAVE COPIES OF IT AND I'LL JUST PASS IT UP.

THE COURT: SURE.

MR. ARD: DID I GIVE YOU A COPY WITH WRITING ON IT?

THE COURT: MINE APPEARS CLEAN ANYWAY.

MR. ARD: OKAY.

MR. GLITZENSTEIN: NO.

MR. ARD: SO HERE -- THIS IS THE SLIDE THAT ACTUALLY DESCRIBES TO PEOPLE WHAT CHECK SPELLING AS YOU TYPE IS, AND AS YOU SEE, IT CONTAINS ALL OF THE SORT OF RELEVANT FEATURES THAT MICROSOFT ACCUSES -- I'M SORRY -- THAT SENTIUS ACCUSES MICROSOFT IN THE ACCUSED FEATURES. AND THIS DESCRIPTION IS DRAWN FROM THE MADISETTI REPORT, YOU KNOW, PARAGRAPH 33, 34, AND ELSEWHERE.

IT SHOWS WHERE THE LINKING IS TAKING PLACE THROUGH, YOU KNOW, IN THE BACKGROUND OF THE LOOK-UP TABLE. AND THIS IS THE FUNCTION -- THE FUNCTIONALITY THAT IS DESCRIBED HERE IS THE FUNCTIONALITY THAT'S ACHIEVED THROUGH A LOOK-UP TABLE, RIGHT? YOU HAVE THE RIGHT CLICKING, YOU HAVE THE LINKING, YOU HAVE THE DISPLAYING. THIS IS THE ACCUSED FEATURE, AND THIS IS THE ACCUSED FEATURE THAT WE HAVE BEEN DESCRIBING IN THIS CASE.

SO THERE'S NOTHING WRONG ABOUT THIS WORDING, AND THEY DIDN'T EVEN SHOW IT TO YOU, BUT THIS IS WHAT DESCRIBES TO THE SURVEY RESPONDENTS WHAT IT IS THEY'RE BEING ASKED TO VALUE. OKAY?

AND, AGAIN, AS JUDGE KOH MADE CLEAR, ANY DESCRIPTION OF THE PATENTED FEATURES, ANY CONCERNS ABOUT THE DESCRIPTION OF THE PATENTED FEATURES GOES TO WEIGHT AND NOT ADMISSIBILITY. OKAY?

SIMILARLY, WITH THE DESCRIPTION OF THE NON-INFRINGING ALTERNATIVE, THAT'S ALSO TAKEN FROM MADISETTI AND YOU CAN -- I DON'T HAVE ANYTHING TO PASS UP TO YOU, BUT YOU CAN SEE IT, FOR EXAMPLE, QUOTED IN MILLS' REPORT ON PAGE 63 WHICH QUOTES THE MADISETTI DESCRIPTION OF THE BEST NON-INFRINGING ALTERNATIVE, AND THAT IS THE LANGUAGE THAT'S USED, DRAWN FROM THAT LANGUAGE, THAT THESE -- THAT THE DESCRIPTION OF THE NON-INFRINGING ALTERNATIVE HERE -- SORRY. I SAID THAT BADLY.

THE DESCRIPTION OF THE NON-INFRINGING ALTERNATIVE IN THE SURVEY IS DRAWN FROM MADISETTI'S DESCRIPTION OF THE BEST NON-INFRINGING ALTERNATIVE. OKAY?

AGAIN, ANY CONCERN THAT THEY HAD ABOUT THE ADEQUACY OF THAT DESCRIPTION GOES TO WEIGHT, NOT ADMISSIBILITY.

AND YOU CAN SEE THE DESCRIPTION I'M TALKING ABOUT IN THE SURVEY ON THE FOLLOWING PAGE OF WHAT I GAVE YOU. THAT'S WHAT DESCRIBES THE NON-INFRINGING ALTERNATIVE, THE BEST NON-INFRINGING ALTERNATIVE ACCORDING TO DR. MADISETTI.

THE COURT: THAT'S THE USER INITIATED SPELL CHECK?

MR. ARD: EXACTLY. AND USER INITIATED SPELL CHECK, WE USE THAT TERM BECAUSE THAT'S MICROSOFT'S TERM. THEY USE THAT TERM IN MICROSOFT WORD ITSELF. WHEN YOU ASK FOR HELP OR

WHATEVER, THAT'S HOW THEY DESCRIBE THESE FEATURES.

SO THE QUESTIONS ARE ASKING ABOUT -- ARE ASKING USERS TO DETERMINE, FOR EXAMPLE, IF OFFICE CONTAINED USER INITIATED SPELL CHECK, WHICH IS THE BEST NON-INFRINGING ALTERNATIVE ACCORDING TO DR. MADISETTI, BUT NOT BACKGROUND SPELL CHECK, WHICH IS THE ACCUSED FEATURE, HOW MUCH MORE WOULD YOU BE WILLING TO PAY FOR BACKGROUND SPELL CHECK? THAT'S THE KIND OF QUESTION THAT'S BEING ASKED HERE.

OR WOULD YOU BE WILLING TO PURCHASE THE PRODUCT IF IT HAD USER INITIATED SPELL CHECK, BUT NOT CHECK USERS -- CHECK SPELLING AS YOU TYPE?

SO BY ASKING THAT QUESTION, THEY'RE JUST -- THEY'RE ASKING THE EXACT THING YOU'RE SUPPOSED TO ASK, WHICH IS SORT OF THE INCREMENTAL VALUE OF THE INFRINGING FEATURE AS COMPARED TO THE ACCUSED -- THE BEST NON-INFRINGING ALTERNATIVE. THAT'S WHAT YOU'RE SUPPOSED TO DO. THAT'S WHAT ALL THE CASES SAY.

SO IN THEIR BRIEF -- AND THEY SAID IT A LITTLE DIFFERENTLY TODAY, BUT IN THEIR BRIEF, IN THEIR OPENING BRIEF SAYS THAT THE SURVEY SHOULD HAVE ASKED ABOUT THE CLAIM ELEMENTS, LIKE THE LOOK-UP TABLE, RIGHT?

I MEAN, JUST SAYING THAT SHOWS HOW RIDICULOUS IT IS. YOU CAN'T ASK A CONSUMER, A USER, HOW MUCH DO YOU VALUE THE LOOK-UP TABLE THAT YOU'VE NEVER SEEN, YOU DON'T KNOW WHAT IT IS, YOU DON'T KNOW WHAT WE'RE TALKING ABOUT? THAT'S NOT THE QUESTION YOU ASK.

AND JUDGE KOH MADE THAT EXACT POINT IN THE APPLE V. SAMSUNG DECISION THAT THEY ACTUALLY HEAVILY RELIED UPON, BUT WE DO, TOO, BECAUSE IT SUPPORTS US.

FIRST, JUDGE KOH SAID, IN REJECTING THE EXACT SAME ARGUMENT, THAT THE ACCURACY OF A SURVEY QUESTION MUST BE EVALUATED FROM THE PERSPECTIVE OF THE SAMSUNG CONSUMER. RIGHT?

APPLE MADE THE -- SORRY. SAMSUNG MADE THE EXACT SAME ARGUMENT THERE THAT, LOOK, YOUR SURVEY IS INEFFECTIVE BECAUSE YOU DIDN'T ACTUALLY DESCRIBE THE CLAIM ELEMENTS, AND WHAT JUDGE KOH SAID IS, NO, THAT'S NOT THE RIGHT THING YOU'RE SUPPOSED TO DESCRIBE. YOU'RE SUPPOSED TO DESCRIBE WHAT'S VISIBLE TO CONSUMERS.

AND SO IN SAMSUNG, THE SURVEY DIDN'T DESCRIBE THE CLAIM ELEMENTS. IT ASKED USERS TO CHOOSE BETWEEN A DEVICE WITH A SINGLE COMPONENT, BACKGROUND FEATURE, AND A DEVICE THAT HAD NO BACKGROUND COMPONENT, EVEN THOUGH THE CLAIM REQUIRES THREE BACKGROUND COMPONENTS.

SO APPLE GETS UP AND SCREAMS, THAT'S NOT THE RIGHT QUESTION. YOU DIDN'T ASK ABOUT THE CLAIM ELEMENTS. THAT'S NOT THE RIGHT CHOICE.

IT'S THE SAME ARGUMENT MICROSOFT IS MAKING HERE EFFECTIVELY.

BUT JUDGE KOH SAID IT WAS FINE, IT WAS OKAY, BECAUSE APPLE CAN ARGUE AT TRIAL THAT TECHNICAL LIMITATIONS MADE THE RELEVANT CHOICE FOR CONSUMERS, FOR SAMSUNG CONSUMERS -- FOR SAMSUNG, SORRY -- BETWEEN BACKGROUND COMPONENT AND NO BACKGROUND COMPONENT.

AND HERE WE'RE GOING TO DO THE SAME THING. HERE SENTIUS IS GOING TO ARGUE AT TRIAL THAT THE RELEVANT CHOICE FOR MICROSOFT IS BETWEEN THE BACKGROUND SPELL CHECK AND USER INITIATED SPELL CHECK. THAT'S THE WHOLE POINT OF MADISETTI'S CONCLUSION THAT THAT'S THE BEST NON-INFRINGING ALTERNATIVE. AND THAT'S WHAT WE'RE GOING TO ARGUE AT TRIAL.

AND JUST AS IN SAMSUNG, WECKER'S QUESTIONS ARE PROPERLY ASKED FROM THE PERSPECTIVE OF THE CONSUMER.

SO THAT SORT OF DEFEATS THAT ARGUMENT THAT THEY MADE IN THEIR OPENING BRIEF. THAT WAS THEIR MAIN ARGUMENT THERE.

IN THEIR REPLY BRIEF, THEY SAY IT A LITTLE DIFFERENT. THEY SAY THE SURVEY WAS OVERBROAD BECAUSE IT ALLEGEDLY INCLUDED NON-PATENTED FEATURES, RIGHT, AND THEY TALK ABOUT, FOR EXAMPLE, THE QUALITY OF THE DICTIONARY OR THE QUALITY OF THE ALGORITHM OR THE SPEED OF THE ALGORITHM. THEY SAY, LOOK, THESE AREN'T PATENTED PARTS OF BACKGROUND -- THIS ISN'T THE PATENTED PART OF THE TECHNOLOGY, THEREFORE, USERS MAY HAVE VALUED THOSE THINGS, THEREFORE, THE QUESTION WASN'T ASKING THE RIGHT THING.

BUT WHAT MICROSOFT NEGLECTS TO CONSIDER IN THAT ARGUMENT IS THAT USERS ARE BEING ASKED TO VALUE THE INCREMENTAL BENEFIT OF THE ACCUSED FEATURE AS COMPARED TO THE NON-INFRINGING ALTERNATIVE.

SO THE --

THE COURT: CAN I ASK YOU A QUESTION ABOUT THAT, MR. ARD?

MR. ARD: YEAH.

THE COURT: BECAUSE I TAKE YOUR POINT THAT THE WAY THE SURVEY WAS ACTUALLY SET UP, THERE WAS A BASELINE INCLUDED OF THE NON-INFRINGING ALTERNATIVE.

NEVERTHELESS, THERE IS THE QUESTION OF WHETHER THE DELTA, OR THE DIFFERENCE ABOVE AND BEYOND THAT BASELINE, REALLY WAS LIMITED TO THE CLAIMED INVENTION OR SOMETHING BROADER.

IF I HAVE CONCERNS ABOUT THE SCOPE OF THAT DELTA --

MR. ARD: RIGHT.

THE COURT: -- IS THAT NOT A METHODOLOGICAL FLAW THAT I NEED TO CONSIDER? OR IS THAT JUST GRIST FOR CROSS-EXAMINATION?

MR. ARD: THAT'S GRIST FOR CROSS-EXAMINATION. THAT'S CONCERN ABOUT THE DESCRIPTION OF THE PATENTED FEATURES, WHICH GOES TO WEIGHT, NOT ADMISSIBILITY. THAT'S WHAT JUDGE KOH SAID.

AND JUST NOTICE, FOR EXAMPLE, THAT THAT DELTA EXCLUDES EVERYTHING THAT MICROSOFT MENTIONS IN ITS REPLY BRIEF. SO, FOR EXAMPLE, IT TALKS ABOUT THE SPEED OF THE DICTIONARY, THE QUALITY OF THE DICTIONARY, THE SPEED OF THE ALGORITHM ACCESSING THE DICTIONARY.

FOREGROUND SPELL CHECK HAS THOSE EXACT SAME THINGS. IT'S USING THE SAME DICTIONARY THAT HAS THE SAME QUALITY. IT'S ACCESSING THAT DICTIONARY WITH THE SAME SPEED.

SO WHEN YOU ASK A USER, HOW MUCH MORE WOULD YOU PAY FOR THE PRODUCT --

THE COURT: EITHER WAY, THE USER IS GETTING THOSE FEATURES IS WHAT YOU'RE SAYING?

MR. ARD: RIGHT. IF YOU TELL A RESPONDENT, ASSUME YOU HAVE FOREGROUND SPELL CHECK, BUT NOT BACKGROUND SPELL CHECK, HOW MUCH MORE WOULD YOU PAY FOR BACKGROUND SPELL CHECK, THEY'RE NECESSARILY NOT VALUING THE QUALITY OF THE DICTIONARY OR EVEN -- BECAUSE THAT'S ALREADY IN THE FOREGROUND SPELL CHECK THAT THEY HAVE.

SO THAT KIND OF DISPOSES OF THE ARGUMENT IN THEIR SECOND -- IN THEIR REPLY BRIEF.

SAMSUNG IMPLIES THE SAME RESULT BECAUSE SAMSUNG IMPLIES THAT COMPARING THE INFRINGING FEATURE TO THE BEST NON-INFRINGING ALTERNATIVE, WHICH IS WHAT WE ASKED THEM TO DO HERE, IS PROPER BECAUSE, BY DEFINITION, THE RELEVANT CHOICE IS BETWEEN THOSE ALTERNATIVES. SO SAMSUNG IMPLIES THAT THE RIGHT THING YOU'RE SUPPOSED TO DO IS ASK, YOU KNOW, ABOUT THE INFRINGING FEATURE AND THE NON-INFRINGING FEATURE AND HOW MUCH MORE YOU'D PAY FOR THE NON-INFRINGING FEATURE, WHICH IS WHAT WE DID.

THE COURT: BY THE WAY, I DIDN'T BOTHER TO CHECK, IS THE QUALITY OF THAT SURVEY ANALYSIS THE SUBJECT OF THE FEDERAL CIRCUIT APPEAL IN APPLE VERSUS SAMSUNG? DO YOU HAPPEN TO KNOW?

MR. ARD: I DON'T KNOW. SORRY, YOUR HONOR.

THE COURT: I'M JUST CURIOUS.

MR. ARD: I'M SURE WE'LL FOLLOW IT CLOSELY.

THE COURT: I'M SURE WE ALL WILL.

MR. ARD: AND THE TEXAS DECISION CITED YESTERDAY KIND OF MAKES THE SAME POINT THAT A REJECTING ARGUMENT THAT THE SURVEY HIGHLIGHTED -- THAT THE SURVEY WAS TOO BROAD BECAUSE IT HIGHLIGHTED NON-INFRINGING FEATURES, BUT THE COURT SAID, LOOK, IF YOU LOOK AT THE ACTUAL SCREEN SHOTS, WHAT IT'S HIGHLIGHTING AND SHOWING IS THE INFRINGING TECHNOLOGY, WHICH IS THE SAME HERE, AND THAT'S KIND OF GOOD ENOUGH, AND OTHER ARGUMENTS THEY HAVE IS FOR THE JURY.

OKAY. I THINK THAT'S ALL I HAVE TO SAY ABOUT ASKING THE RIGHT QUESTIONS UNLESS YOU HAVE ANY QUESTIONS ABOUT THAT.

THE COURT: NO, I THINK I HAVE MY QUESTIONS ANSWERED ON THAT.

MR. ARD: OKAY. SO DR. WECKER'S USE OF DIRECT METHOD IS NOT FLAWED, AND THIS IS REALLY THE HYPOTHETICAL BIAS ARGUMENT THAT THEY SAY NOW IN THEIR SLIDES, THEY CALL IT LEADING QUESTIONS. OKAY?

BUT, AGAIN, IT'S JUST BASIC BLACK LETTER LAW, SOUTHLAND SOD, THE NINTH CIRCUIT CASE, SAYS IT, THAT AN OBJECTION TO LEADING QUESTIONS IS FOR THE JURY. THAT'S JUST BASIC LAW.

THE COURT: AND IS THIS -- CAN I ASK YOU, MR. ARD, ON THAT ONE, IS THE STANDARD FOR WHETHER A QUESTION IS LEADING THE

STANDARD THAT ALL OF US WHO DO TRIAL WORK FOR A LIVING ARE RELATIVELY FAMILIAR WITH? OR IS IT A DIFFERENT STANDARD WHEN YOU'RE TALKING ABOUT A SURVEY?

I WAS JUST CURIOUS OF WHETHER THERE'S A PARTICULAR FLAVOR OF LEADING IN THE SURVEY WORLD THAT I NEED TO BE APPRECIATIVE OF.

MR. ARD: NO, I DON'T --

THE COURT: LEADING IS LEADING, RIGHT?

MR. ARD: YEAH, IT IS. I MEAN, WHAT THEY MEAN BY LEADING IS, OR SUGGESTIVE, WHICH IS WHAT FORTUNE DYNAMIC, ANOTHER NINTH CIRCUIT CASE, SAYS IS FOR THE JURY. A SUGGESTIVE QUESTION IS ONE WHERE -- WHAT THEY'RE SAYING HERE, WHICH IS THAT THE QUESTION WAS SUGGESTIVE OR LEADING BECAUSE YOU ASKED ABOUT THIS ONE PARTICULAR FEATURE, BACKGROUND SPELL CHECK, AND OF COURSE THEY'RE GOING TO SAY IT'S SO VALUABLE BECAUSE YOU ASKED ABOUT IT, IT'S LEADING IN THAT SENSE.

AGAIN, THAT'S FOR THE JURY.

THE COURT: IN THAT SENSE, IT'S A DIFFERENT KIND OF LEADING THAN THE ONE WE SEE MORE OFTEN HERE, WHICH IS YOU WOULDN'T BUY THAT COPY OF MICROSOFT WORD UNLESS IT HAD BACKGROUND SPELL CHECK, WOULD YOU? THAT KIND OF THING.

MR. ARD: RIGHT, THAT WOULD BE A MORE EXTREME EXAMPLE.

THE COURT: I GET IT.

MR. ARD: BUT IT STILL WOULD BE FOR THE JURY.

JUST A FEW OTHER CASES. HARTLE, WHICH IS DIRECTLY ON POINT AND WHICH MICROSOFT IGNORES IN THEIR REPLY, SAYS EXPLICITLY THAT HYPOTHETICAL BIAS IS FOR THE JURY. IT'S THE SAME ISSUE THERE. THAT'S THE ONE WHERE THEY ASKED, YOU KNOW, HOW MUCH MORE WOULD YOU PAY FOR A HOUSE -- HOW MUCH LESS WOULD YOU PAY FOR A HOUSE THAT'S NEAR POLLUTION?

IT'S A DIRECT METHOD. YOU'RE LISTING THE FEATURE. EXACT SAME ISSUE.

AND THE DEFENDANTS CAME BACK AND SAID, FOUL, HYPOTHETICAL BIAS. THE COURT SAID IT'S FOR THE JURY. THEY IGNORED THAT IN THE BRIEF, BUT THAT'S THE LAW.

THE TEXAS DECISION, CITED YESTERDAY, SAYS THAT THE ARGUMENT THAT, QUOTE, "LEADING QUESTIONS," QUOTE, "CAUSED," QUOTE, "CONFLATED VALUE," QUOTE, OF THE ACCUSED FEATURES WAS FOR THE JURY.

AND, AGAIN, FORTUNE DYNAMICS SAYS THAT'S SUGGESTIVE QUESTIONS FOR THE JURY. SOUTHLAND SAYS THEY'RE LEADING QUESTIONS FOR THE JURY.

ON THE MERITS, THE ARGUMENT ALSO FAILS. THIS IS SORT OF A LITTLE TECHNICAL AND HASN'T REALLY BEEN TALKED ABOUT, BUT MICROSOFT ONLY CITES EVIDENCE OF HYPOTHETICAL BIAS IN THE WILLINGNESS TO PAY QUESTIONS. RIGHT? THERE'S NOTHING IN ANY OF THE BRIEFING THAT SUGGESTS ANY PROBLEM WITH HYPOTHETICAL BIAS IN THE WOULD YOU HAVE PURCHASED QUESTIONS.

SO, REMEMBER, THE WOULD YOU HAVE PURCHASED QUESTIONS ARE

THE ONES THAT ARE RELEVANT TO THE INCOME APPROACH, AND THE WILLINGNESS TO PAY QUESTIONS ARE THE ONES THAT ARE RELEVANT TO, OR USED BY MILLS FOR COMPARING THE LUCENT FEATURES.

THERE'S JUST NO EVIDENCE ANYWHERE THAT THE HYPOTHETICAL BIAS AFFECTS THE -- WHETHER THEY WOULD HAVE PURCHASED QUESTIONS.

THE MILLER ARTICLE SUPPORTS MILLS' USE OF WECKER'S MEAN WILLINGNESS TO PAY ESTIMATES. AND AGAIN, THIS IS IN OUR BRIEF.

BUT THE POINT IS THAT THE MILLER ARTICLE, THAT 2011 ARTICLE, SHOWS THAT, YOU KNOW, THIS DIRECT METHOD OF ELICITING WILLINGNESS TO PAY RESPONSES ACTUALLY DOES A GOOD JOB OF ELICITING MEAN WILLINGNESS TO PAY ESTIMATES. THEY COULDN'T FIND ANY HYPOTHETICAL BIAS IN THAT CONTEXT. AND THAT'S ALL THAT MILLS USED IT FOR.

AND ALSO, I MEAN, YOU KIND OF TOUCHED ON THIS, BUT MICROSOFT'S ARGUMENT, AGAIN, YOU KNOW, ON THE HYPOTHETICAL BIAS ISSUE KIND OF PROVES TOO MUCH BECAUSE AS WE'VE CITED IN OUR MOTION, THE MILLER ARTICLE EXPLICITLY SAYS THE HYPOTHETICAL BIAS EFFECTS, YOU KNOW, CONJOINT ANALYSIS JUST AS MUCH AS IT DOES DIRECT METHOD, BLAH, BLAH, BLAH, AND MICROSOFT AGREES THAT THE CONJOINT METHOD IS COMMONLY USED AND COURTS ACCEPT IT.

SO THEIR ARGUMENT ABOUT YOU CAN'T USE A SURVEY WHEN THE HYPOTHETICAL BIAS IS AT ISSUE PROVES TOO MUCH.

LET'S SEE. DR. WECKER'S DECISION NOT TO USE THE CONJOINT APPROACH IS PROPER. THIS IS KIND OF ONE OF THOSE CURIOUS

INSTANCES WHERE THEIR ENTIRE OPENING BRIEF SORT OF ARGUED THAT THE -- THAT A SURVEY SHOULD BE EXCLUDED BECAUSE IT SHOULD HAVE USED A CONJOINT APPROACH AS OPPOSED TO A DIRECT APPROACH.

WE CAME BACK AND WE SAID THAT MICROSOFT HAS NO AUTHORITY SAYING THAT THE CONJOINT APPROACH SHOULD BE -- IS USED TO THE EXCLUSION OF THE DIRECT APPROACH. WE CITED THE MILLER ARTICLE WHICH SAYS THAT MANY MARKETING RESEARCHERS FAVOR THE DIRECT APPROACH. IT SAYS THAT IN THE CONTEXT OF TALKING ABOUT STATE OF THE ART APPROACHES, WHICH THE DIRECT APPROACH IS ONE.

YOU KNOW, WE ALSO POINT OUT THAT THE CONJOINT APPROACH IS JUST AS SUSCEPTIBLE TO HYPOTHETICAL BIAS AS THE DIRECT APPROACH.

AND ALSO, WE POINTED OUT THAT THE DIRECT APPROACH WAS BETTER HERE BECAUSE THERE ARE SO MANY FEATURES AT ISSUE -- THE CONJOINT APPROACH REQUIRES YOU TO KIND OF PICK OUT SIX FEATURES TO ASK ABOUT, AND MICROSOFT THEMSELVES ACKNOWLEDGE THERE'S NO SIMPLE WAY OF DOING THAT.

AND THAT'S WHY THE DIRECT APPROACH HERE IS BETTER BECAUSE YOU CAN ASK ABOUT THE ONE FEATURE YOU KNOW IS THE RELEVANT FEATURE. YOU DON'T HAVE TO GET IN THAT --

THE COURT: THAT'S A PRETTY GOOD POINT. IT'S AT LEAST ADMISSIBLE.

MR. ARD: IT'S AT LEAST WHAT?

THE COURT: ADMISSIBLE.

MR. ARD: RIGHT. BUT I SAID CURIOUS BECAUSE THE

REPLY BRIEF NEVER TALKS ABOUT THAT AGAIN AND THEY DIDN'T TALK ABOUT IT AGAIN TODAY, SO I GUESS THEY'VE ABANDONED THAT ARGUMENT.

AND THERE'S NO AUTHORITY SAYING THAT YOU -- THAT -- THERE'S NO LEGAL AUTHORITY, NO AUTHORITY OF AN EXPERT IN THE FIELD SAYING THAT YOU CAN EXCLUDE A DIRECT METHOD QUESTION BECAUSE IT WASN'T A CONJOINT QUESTION.

THE -- WECKER'S DIRECT METHOD APPROACH IS COMMONLY ACCEPTED. AND WE KIND OF TALKED ABOUT HERE ALREADY THE ARGUMENT THAT MICROSOFT MAKES THAT YOU HAVE TO SHOW THAT THIS PARTICULAR TYPE OF SURVEY IN THIS CONTEXT WAS USED BY BUSINESSES.

THAT'S NOT DAUBERT. THERE'S NOTHING IN DAUBERT THAT SAYS THAT. THEY DON'T CITE A CASE EVER FOR IT. THERE'S NOTHING IN DAUBERT THAT SUGGESTS THAT.

IF THAT WERE THE RULE, IF THE RULE WERE THAT YOU HAVE TO SHOW THAT A SURVEY OF THIS TYPE IS ACCEPTED BY BUSINESSES MAKING DECISIONS OR WHATEVER ELSE, ALL THE OTHER CASES I CITED WOULD BE WRONG, RIGHT, BECAUSE YOU COULDN'T HAVE SHOWN, IN FORTUNE DYNAMIC, FOR EXAMPLE, THAT A DEFECTIVE SURVEY, BECAUSE IT WAS ON THE INTERNET, IT WAS SUGGESTIVE AND HAD COUNTERINTUITIVE RESULTS, WAS COMMONLY ACCEPTED BY EXPERTS, RIGHT? THE NINTH CIRCUIT SAID THAT'S FOR THE JURY, RIGHT?

I MEAN, ALL THESE CASES WHERE THEY POINTED OUT THESE DEFECTS, THERE'S NO SUGGESTION, WHICH MICROSOFT ASSERTS WITHOUT

AUTHORITY, THERE'S NO SUGGESTION THAT YOU HAVE TO SHOW THAT A SURVEY OF THAT EXACT TYPE HAS TO HAVE BEEN ADOPTED IN THE OTHER DECISIONS.

SO -- BUT EVEN IF MICROSOFT'S RULE WERE CORRECT, RIGHT, EVEN IF THE RULE IS CORRECT THAT YOU HAVE TO SHOW THAT EXPERTS HAVE USED THESE KINDS OF SURVEYS IN THIS KIND OF CONTEXT BEFORE, WE WOULD STILL BE OKAY BECAUSE, FIRST, TWO HIGHLY QUALIFIED EXPERTS, DR. WECKER AND DR. JAY IN THE LUCENT SURVEY, DECIDED TO USE THE EXACT SAME TYPE OF SURVEY IN THIS CONTEXT IN MEASURING THE VALUE OF A FEATURE OF OFFICE IN THE CONTEXT OF MULTI MILLION DOLLAR NEGOTIATIONS.

AND THE LUCENT COURT AND THE JURY AGREED THERE. SO THAT'S ONE EXAMPLE WHERE YOU HAVE SOME EXPERTS THAT ARE DECIDING THAT THIS IS THE WAY TO APPROACH THIS QUESTION.

THEY DON'T HAVE ANYBODY TELLING US THAT'S NOT THE WAY. THERE'S NOBODY OUT THERE SAYING THIS IS NOT THE WAY TO DO IT.

SECOND -- SO IN THEIR REPLY BRIEF, THEY TALK ABOUT FOR THE FIRST TIME THE DIFFERENCES BETWEEN THE LUCENT SURVEY AND OUR SURVEY. THEY TALK ABOUT SEVERAL OF THEM.

WHAT THEY OMIT TO MENTION IS THAT IN THE LUCENT CASE, MICROSOFT ITSELF HAD HIRED AN EXPERT WHO -- AND I'M JUST GOING TO PASS THESE UP, IT'S NOT IN OUR BRIEFING -- THIS IS CITED IN THE POST-TRIAL BRIEFS IN LUCENT, AND THIS IS A DEPOSITION TRANSCRIPT OF PHILIP JOHNSON, WHO WAS AN EXPERT IN THE LUCENT CASE.

AND IF YOU LOOK ON PAGES 1 -- WELL, THAT FIRST PAGE IN THE UPPER RIGHT HAND QUADRANT, PAGE 140 OF THE TRANSCRIPT, THE HIGHLIGHTED PART TOWARDS THE BOTTOM -- WELL, FIRST YOU LOOK AT THE TOP AND THIS MICROSOFT SURVEY EXPERT IS SAYING THAT IN THAT CASE, WHAT IT -- WHAT HE DID IS THAT HE SHOWED THEM A WAY OF CALENDARING -- HE SHOWED THEM A VERSION OF OFFICE, OR OF OUTLOOK, THAT WOULDN'T HAVE THE SAME CALENDAR FEATURE APPOINTMENT THAT LUCENT WAS ACCUSING MICROSOFT OF IN THE CASE, AND HE ASKED, YOU KNOW, WOULD IT HAVE MATTERED TO YOU AT ALL IF IT DIDN'T HAVE THAT FEATURE?

AND THEN HE ASKED, WOULD IT HAVE AFFECTED YOUR PURCHASING DECISION IF IT DIDN'T HAVE THAT FEATURE? OKAY?

AGAIN, THE TRANSCRIPT MAKES IT A LITTLE CLEARER ON PAGE -- ON THE LAST PAGE THAT, AGAIN, IN LUCENT, A MICROSOFT SURVEY EXPERT WAS USED TO -- WAS USED TO ADDRESS -- WAS -- ASKED CONSUMERS HOW MUCH THEY WOULD HAVE BEEN -- WHETHER THEY WOULD HAVE PURCHASED THE PRODUCT WITHOUT THE RELEVANT FEATURE.

SO NOW WE HAVE THREE EXPERTS, ONE OF WHICH IS MICROSOFT'S EXPERT, THAT ARE USING THE SAME METHOD IN THE SAME CONTEXT.

THERE ARE PLENTY MORE EXAMPLES, BUT I'LL LEAVE IT THERE.

WE ALSO HAVE, OF COURSE, THE MILLER ARTICLE THAT SAYS THAT MANY MARKETING RESEARCHERS FAVOR THE DIRECT METHOD, AGAIN, SHOWING THAT EVEN IF MICROSOFT'S RULE WERE CORRECT, IT'S SATISFIED HERE BECAUSE THE MILLER ARTICLE ITSELF, IF YOU LOOK AT THE BEGINNING OF IT, IT TALKS ABOUT HOW THESE -- THE DIRECT

METHOD OF ELICITING WILLINGNESS TO PAY RESPONSES IS USED FOR PRICING DECISIONS, FOR PROFIT DECISIONS, ALL ACROSS THE FIELDS.

I DON'T KNOW WHAT THEY'RE TALKING ABOUT WHEN THEY SAY THERE'S NO EVIDENCE IT WAS USED.

ON THAT POINT, JUST ON THIS ISSUE THAT YOU NEED TO SHOW THAT BUSINESSES USE SURVEYS IN THIS CONTEXT, WHICH MICROSOFT SAYS IS NOT THE RULE -- IT'S NOT ABOUT IT'S NOT THE RULE, BUT THAT'S WHAT MICROSOFT SAYS.

IN A HYPOTHETICAL NEGOTIATION, YOU'RE SUPPOSED TO USE THE BEST AVAILABLE INFORMATION YOU HAVE, RIGHT, AND IN THE HYPOTHETICAL NEGOTIATION, WE'RE TRYING TO FIGURE OUT, HOW MUCH IS THIS FEATURE WORTH? RIGHT?

AND SO WHAT'S ONE THING THAT THEY WOULD LIKE TO DO, WHICH THE LUCENT COURT APPROVED OF, THE DISTRICT COURT ON REMAND APPROVED OF, SAID IS YOU COULD GO OUT AND TAKE A SURVEY AND ASK THEM, WOULD YOU HAVE BOUGHT THE PRODUCT WITHOUT THIS FEATURE?

AND THAT'S WHAT WE DO HERE. THAT'S PERFECTLY APPROPRIATE.

AGAIN, THE MILLER ARTICLE SAYS THIS IS WHAT RESEARCHERS DO, THIS IS WHAT PRACTITIONERS DO, ET CETERA.

SO LET ME JUST QUICKLY WALK THROUGH A COUPLE OF POINTS THAT THEY MAKE.

THE COURT: ON BEHALF OF MY STAFF, MR. ARD, WHO ARE PROBABLY MUCH MORE ENERGETIC THAN I AM, MAY I ASK YOU TO FOCUS ON ONE POINT --

MR. ARD: YEAH.

THE COURT: -- AND BRING THIS TO A HEAD?

MR. ARD: OH, SURE.

QUALITY CONTROLS.

THE COURT: SURE.

MR. ARD: I DON'T KNOW WHERE TO START AND WHERE TO END. I MEAN, ALL THE CASES, PODS ENTERPRISES, WELLS FARGO, FORTUNE DYNAMIC MAKE IT CLEAR THAT QUALITY CONTROL ISSUES GO TO WEIGHT, NOT ADMISSIBILITY.

THE PODS ENTERPRISES CASE SAYS EXACTLY THAT. MICROSOFT TRIES TO DISTINGUISH IT BY SAYING, OH, IN PODS ENTERPRISES, THEY USED A RELIABLE SURVEY TYPE.

BUT THAT'S NOT THE POINT. THE POINT WAS THERE THEY'RE SAYING, OKAY, YOU USED A TYPE OF SURVEY THAT'S RELIABLE, BUT YOUR QUALITY CONTROLS WERE TERRIBLE.

THE COURT SAID, SO WHAT? TAKE IT TO THE JURY. TECHNICAL FLAWS, THE NINTH CIRCUIT SAYS AGAIN AND AGAIN, IS FOR THE JURY.

THE COURT: AT SOME POINT, THOUGH, THE QUALITY CONTROLS -- IT SEEMS TO ME THAT AT SOME POINT QUALITY CONTROL ITSELF MUST BE SUBJECT TO A DAUBERT CHALLENGE IF THEY ARE SO POORLY IMPLEMENTED OR NOT IMPLEMENTED AT ALL THAT THEY UNDERMINE THE GENERAL RELIABILITY OF THE SURVEY AS A WHOLE, RIGHT?

I MEAN, IT CAN'T JUST BE THAT YOU CAN CHARACTERIZE ANY CHALLENGE AS A QUALITY CONTROL CHALLENGE AND SAY LET THE JURY SORT IT OUT.

WOULD YOU AGREE WITH AT LEAST THAT MUCH?

MR. ARD: WELL, YES AND NO. I WOULD AGREE THAT I DON'T NEED TO ARGUE OTHERWISE BECAUSE THAT'S NOT THIS CASE.

IN FACT, NOT TO NITPICK, BUT SOUTHLAND SOD, THE NINTH CIRCUIT'S CASE, SAYS THAT THE JURY IS -- UNLIKE NOVEL SCIENTIFIC THEORIES, THE JURY CAN ASSESS, QUOTE, "WHETHER TECHNICAL DEFICIENCIES UNDERMINE A SURVEY'S PROBATIVE VALUE."

SO IF YOU'RE TALKING ABOUT A CASE WHERE THE QUALITY CONTROLS ARE SO BAD THAT YOU WANT TO THROW IT OUT ON DAUBERT, THAT'S THE EXACT KIND OF ISSUE THAT THE JURY IS QUITE CAPABLE OF ADDRESSING AND FIGURING OUT FOR THEMSELVES. THAT'S WHAT SOUTHLAND SOD SAYS.

SO I'M NOT SURE IF I COMPLETELY AGREE, BUT THIS CERTAINLY ISN'T THAT CASE ANYWAY.

AND I GUESS -- I MEAN, JUST A COUPLE POINTS. ON THESE TRICK QUESTIONS, MICROSOFT DOESN'T HAVE ANY AUTHORITY OF SAYING YOU HAVE TO USE TRICK QUESTIONS. DR. WECKER, IN OUR BRIEF, EXPLAINS WHY HE DOESN'T LIKE THEM. IT JUST THROWS THE READER OFF AND MAKES THEM SUSPICIOUS. YOU'RE TRYING TO ASK SIMPLE QUESTIONS.

AND IN LUCENT ITSELF -- LET ME JUST PASS THIS ONE UP, TOO, BECAUSE, AGAIN, THE RESPONSE IS IN THEIR REPLY BRIEF -- THEY SAY THAT -- THEY RELY A LOT ON THE FACT THAT IN LUCENT, THEY USED A HARVARD QUESTION.

BUT THEY FAIL TO MENTION THAT IN LUCENT, LUCENT ITSELF

SAID THAT THE SUBJECT MATTER OF OUR SURVEY DID NOT REQUIRE THESE TRICK QUESTIONS, OKAY?

AND THEN IF YOU LOOK AT THE TESTIMONY AT TRIAL, SHE SAYS, IN THE LAST PAGE HERE, "MOST MARKETING RESEARCH STUDIES -- MOST ELECTION POLLS DON'T USE ANY TYPE OF FICTITIOUS ITEM." SO ANYWAY.

RACERS, THAT'S IN OUR BRIEF. THERE'S NOTHING THERE.

OMNIBUS, THE ONLY COMPLAINT ABOUT OMNIBUS IS THAT PRIOR QUESTIONS THAT AREN'T RELATED MIGHT THROW OFF -- PRIOR QUESTIONS THAT ARE RELATED COULD THROW IT OFF.

BUT HERE THE PRIOR QUESTIONS WERE ABOUT BAKED BEANS AND AIRPLANES. THERE'S NO PROBLEM THERE.

AND SO I GUESS JUST THE LAST THING I'LL TALK ABOUT IS JUST THE CALIBRATION FACTOR.

OH, LET ME -- AUTO CORRECT, JUST IF YOU LOOK AT THE LANGUAGE THERE THAT IS USED TO DESCRIBE WHAT BACKGROUND SPELL CHECKING IS, IT TALKS ABOUT A WORD THAT HAS A SQUIGGLY LINE UNDERNEATH IT, YOU RIGHT CLICK ON IT, IT PULLS UP SUGGESTED SPELLINGS.

THAT'S NOT AUTO CORRECT. NONE OF THAT HAPPENS IN AUTO CORRECT.

SO I DON'T KNOW WHAT THEY'RE TALKING ABOUT WHEN THEY SAY THAT THAT LANGUAGE COULD HAVE CONFUSED RESPONDENTS WHEN THEY'RE TALKING ABOUT AUTO CORRECT.

SO ON THE CALIBRATION FACTOR, THE PRACTICAL -- AS A

PRACTICAL MATTER, IT DOESN'T MATTER. I MEAN, THIS -- THIS ARGUMENT IS SILLY BECAUSE REALLY WHAT THEY'RE ATTACKING HERE IS A HYPOTHETICAL BIAS. THEY'RE SAYING IT'S SO BIASED YOU CAN'T FIX IT.

BUT THAT ARGUMENT WE'VE ADDRESSED ALREADY. THE CASES SAY THAT'S FOR THE JURY, BLAH, BLAH, BLAH, AND IT DOESN'T HAVE VALIDITY.

SO ONCE YOU THROW THAT ARGUMENT OUT, I DON'T KNOW WHAT THEIR POINT IS. I MEAN, IF YOU CAN USE THE SURVEY, THE CALIBRATION JUST HELPS THEM. IT JUST LOWERS THE WILLINGNESS TO PAY.

SO I DON'T KNOW WHAT THEIR PROBLEM IS WITH USING CALIBRATION, ESPECIALLY BECAUSE THE ONLY POINT IT'S USED FOR IS TO COMPARE -- BY MILLS IS TO COMPARE THE WILLINGNESS TO PAY IN OUR CASE WITH THE WILLINGNESS TO PAY IN LUCENT.

AND IN LUCENT, THEY DIDN'T APPLY A CALIBRATION FACTOR AT ALL. SO IT'S NOT -- SO IF ANYTHING, YOU KNOW, WE'RE HELPING THEM BY MAKING A MORE CONSERVATIVE ASSUMPTION THAN THEY MADE IN LUCENT.

AND LET ME JUST ALSO PASS THAT UP JUST SO YOU HAVE IT, BECAUSE I REALIZED LATER THAT WHILE MICROSOFT ATTACHED THE COLBY REPORT TO ITS MOTION, IT DIDN'T ATTACH ALL OF IT. I THOUGHT IT HAD.

AND I HIGHLIGHT FOR YOU HERE THE SENTENCE THAT SAYS THAT, IN THE JAY SURVEY IN THE LUCENT CASE, THEY DIDN'T USE A

CALIBRATION FACTOR. SO THAT'S JUST WHY I'M HANDING THAT UP.

AND, AGAIN, CALIBRATION FACTOR HAS AMPLE SUPPORT IN THE FIELD.

YOU KNOW, THE -- MILLER FOUND A SIMILAR BIAS IN 2011 FOR CALIBRATION FACTOR. YES, THERE'S WIDE VARIETY, BUT THE POINT IS THAT THERE ARE VARIABLES THAT THEY IDENTIFY THAT SHOW THAT IN CERTAIN CIRCUMSTANCES YOU GET A HIGHER BIAS. IN OTHERS YOU GET A LESSER BIAS, AND THAT'S WHAT WECKER DID IS HE USED THOSE VARIABLES TO THEN DERIVE THE 1.4 THAT HE USED HERE.

SO ANYWAY, THAT'S IT.

UNLESS THERE ARE ANY FURTHER QUESTIONS, YOUR HONOR, THAT'S ALL I HAVE.

THE COURT: I THINK I HAVE IT, MR. ARD. THANK YOU VERY MUCH FOR YOUR PRESENTATION.

ANY BRIEF REBUTTAL?

MR. GLITZENSTEIN: VERY BRIEF, YOUR HONOR.

I WAS SURPRISED BY MR. ARD'S ASSERTION THAT WE HAVEN'T CITED ANY CASES THAT WOULD WARRANT EXCLUSION ON THE ARGUMENTS THAT WE MADE. WE CERTAINLY CITED THE GEORGIA-PACIFIC CASE IN OUR OPENING BRIEF THAT SAYS RELIABLE SURVEY QUESTIONS SHOULD AVOID THE USE OF CONFUSING AND AMBIGUOUS QUESTIONS, WHICH I WOULD SUBMIT IS A PRETTY SELF-EVIDENT PROPOSITION. THEY DON'T RESPOND TO THAT CASE IN THEIR BRIEF.

THE FRACTUS CASE IS DIRECTLY ON THE POINT THAT THE SURVEY QUESTIONS HAVE TO BE TIED TO THE PATENTED ISSUES, NOT THE

UNPATENTED FEATURES.

THE COURT: CAN I JUST ASK ONE QUESTION ABOUT FRACTUS?

MR. GLITZENSTEIN: YES.

THE COURT: IT'S BEEN SOME TIME SINCE I'VE READ IT. WAS THAT -- WAS THAT CASE LOOKING AT THE QUALITY OF THAT EVIDENCE AFTER TRIAL OR IN THE DAUBERT CHALLENGE CONTEXT?

MR. GLITZENSTEIN: IT WAS A DAUBERT CHALLENGE, YOUR HONOR.

THE COURT: IT WAS A DAUBERT CHALLENGE?

MR. GLITZENSTEIN: IT WAS ACTUALLY, I BELIEVE, ONE OF MR. TRIBBLE'S CASES.

MR. TRIBBLE: IT WAS, YOUR HONOR. I KNOW ALL ABOUT IT. I THINK MAGISTRATE LOVE WOULD DECIDE IT DIFFERENTLY TODAY.

MR. GLITZENSTEIN: AND THEY HAVE NO RESPONSE IN THEIR BRIEFING TO OUR FRACTUS AUTHORITY.

SO CERTAINLY THOSE TWO CASES STAND FOR THE -- SUPPORT THE PROPOSITIONS THAT WE'RE ASSERTING.

I'D ALSO NOTE ON THIS DROPLETS CASE, WHICH WE RECEIVED LAST EVENING, THE DIFFERENCES BETWEEN THE SURVEY HERE AND THE, AND THE ONE THAT DR. WECKER CONDUCTED REALLY ARE QUITE STRIKING AND, FRANKLY, MAKE SOME OF MY POINTS.

FOR EXAMPLE, ONE OF THE CHALLENGES TO THE SURVEY IN DROPLETS WAS THAT IT WAS LEADING. BUT THE QUESTIONS THERE CONTEMPLATED A BROAD SPECTRUM OF RESPONSES WHICH ASKED

RESPONDENTS HOW TO RATE HOW OFTEN THEY USED EACH FEATURE, HOW IMPORTANT EACH FEATURE IS TO THEM. ONE OF THE QUESTIONS WAS THIS OPEN-ENDED FILL-IN-THE-BLANK.

THAT'S THE SORT OF QUESTION THAT WE'RE JUST MISSING HERE.

THE COURT: I TOOK JUDGE PAYNE'S POINT TO BE THE FACT HE DIDN'T THINK THAT THEY WERE LEADING AT ALL, OR NOT LEADING ENOUGH TO RAISE A METHODOLOGICAL CONCERN.

MR. GLITZENSTEIN: RIGHT. WE'RE NOT SAYING -- IF DR. WECKER SIMPLY ASKED PEOPLE WHY THEY BOUGHT THE PRODUCT, WE'VE ALL SEEN THE TYPE OF SURVEYS WHERE YOU HAVE 20 PRODUCT FEATURES THAT ARE LISTED AND SAY RANK IN ORDER YOUR FAVORITE FIVE, THINGS LIKE THAT. THOSE ARE FAIR GAME.

BUT WHEN YOU TAKE SOMEBODY BY THE -- WHEN YOU SORT OF LEAD THEM BY THE NOSE AND THEN ASK THEM ONLY ABOUT THAT FEATURE, THAT'S THE CORE DEFECT AND THAT'S SOMETHING THAT REALLY DISTINGUISHES DROPLETS PRETTY FUNDAMENTALLY.

NOW, APPLE, I'LL RETURN TO THAT AND I THINK THIS IS MY LAST POINT, THE COURT IN APPLE V. SAMSUNG WENT TO GREAT PAINS TO CONSIDER THE CORE OF THE ARGUMENT THAT WE'RE MAKING, WHICH IS THAT THE CLAIMED QUESTIONS HAVE TO BE TIED TO THE FEATURES OF THE ASSERTED TECHNOLOGY. IT'S NOT FAIR TO DO IT OTHERWISE, AND IT'S NOT METHODOLOGICALLY -- EXCUSE ME -- PROPER, AND IT IS A DAUBERT ISSUE.

AND IT -- THE ANALYSIS IN THAT CASE GOT DOWN TO THE LEVEL OF WHETHER THE -- YOU KNOW, IT WAS APPROPRIATE FOR THE EXPERT

THERE TO HAVE ASKED ABOUT, YOU KNOW, ONE BACKGROUND PROCESSING TECHNOLOGY INSTEAD OF ASKING ABOUT THREE BACKGROUND SYNCHRONIZATION. I GUESS THE CLAIMS THERE REQUIRED THREE DIFFERENT BACKGROUND SYNCHRONIZATIONS. THE QUESTIONS ONLY ASKED ABOUT ONE.

NOW, I'LL PAUSE THERE FOR JUST A MOMENT.

THOSE ARE QUESTIONS THAT ARE TIED MUCH MORE CLOSELY TO THE CLAIMS OF THAT CASE THAN ANYTHING THAT WE SEE IN DR. WECKER'S SURVEY. THAT IS THE LEVEL OF SCRUTINY THAT THESE QUESTIONS GOT IN THE APPLE CASE, AND WE SUBMIT THAT'S THE APPROPRIATE LEVEL OF SCRUTINY FOR DR. WECKER'S QUESTIONS TO GET.

AND, FRANKLY, THE ONLY REASON THAT I READ IN THIS OPINION THAT ASKING ONLY ABOUT ONE BACKGROUND SYNCHRONIZATION RATHER THAN THE THREE THAT WERE CLAIMED WAS WARRANTED WAS BECAUSE SAMSUNG HAD PRESENTED NO EVIDENCE TO REBUT THE CONTENTION THAT YOU HAD TO HAVE -- IF YOU HAD ONE, YOU HAD TO HAVE THREE. SO THERE WASN'T, YOU KNOW, SORT OF AN ALTERNATIVE.

AND THIS IS SOMETHING THAT IS A FUNDAMENTAL DIFFERENCE FROM THIS CASE.

MR. ARD SUGGESTED THAT THE QUESTIONS THAT MR. WECKER ASKED -- EXCUSE ME -- POSED SORT OF THE NON-INFRINGING ALTERNATIVE VERSUS WHAT THEY WERE ACCUSING.

THAT IS ABSOLUTELY NOT THE CASE, YOUR HONOR. IN FACT, WE HAVE, AS MR. LAMBERSON ALLUDED TO EARLIER THIS MORNING, WE HAVE SHOWN THAT THIS FEATURE CAN BE IMPLEMENTED WITH NO USER

PERCEPTIBLE DIFFERENCE WHATSOEVER BY SIMPLY NOT CONSULTING THE TABLE UPON THE RIGHT CLICK OF THE RED SQUIGGLE.

SO DOES THIS QUESTION GET TO THAT DIFFERENCE? NO, IT DOES NOT.

SO THIS IS NOT A QUESTION THAT IS IN ANY WAY, SHAPE, OR FORM ANALOGOUS TO THE QUESTIONS AT ISSUE IN THE APPLE SURVEY. THAT FOCUSSED ON, ON A -- ON SORT OF A SIMPLIFICATION OF THE CLAIM THAT NOBODY DISPUTED WAS NOT SUBJECT TO A NON-INFRINGING ALTERNATIVE.

WE VERY MUCH DISPUTE THAT, AND THAT'S THE ONLY REASON, I SUBMIT FROM READING THAT OPINION, THAT THAT QUESTION ACTUALLY PASSED MUSTER. OTHERWISE THAT SURVEY WAS FLAWED FOR NOT ASKING ABOUT THE THREE BACKGROUND SYNCHRONIZATIONS BECAUSE THAT'S WHAT THE CLAIM SAID.

AND THAT REALLY JUST UNDERSCORES JUST HOW FAR REMOVED THIS QUESTION IS FROM THE CLAIM.

FINAL POINT. MR. ARD'S SUGGESTION THAT THIS IS SORT OF A -- THIS SORT OF HAS, AS ITS COMMON DENOMINATOR, THE SPEED OF THE SPELL CHECK ROUTINE AND THE DICTIONARY, WELL, ONE THING THAT THIS COMPARISON BETWEEN THE PRIOR MANUAL OPERATED SPELL CHECK AND THE ONE THAT'S ACCUSED IN THIS CASE DOESN'T HAVE IS, OF COURSE, THE RED SQUIGGLY LINE.

THERE'S NO RED SQUIGGLY LINE PUT UP IN THE, IN THE USER INITIATED SPELL CHECKER. THAT'S VALUABLE, ADDITIONAL TECHNOLOGY, VALUABLE, ADDITIONAL USER APPEAL THAT SENTIUS IS

TRYING TO TAKE CREDIT FOR BY ASKING THE QUESTIONS AS BROAD AS THIS.

I MEAN, IT'S JUST REALLY THROUGHOUT. WHEN YOU PUT THIS SURVEY AND THE QUESTIONS THAT WERE ASKED UP AGAINST ALL THE SURVEY QUESTIONS THAT ARE REPORTED IN THESE DECISIONS, THIS FALLS WELL SHORT.

THE COURT: ALL RIGHT.

MR. GLITZENSTEIN: THANK YOU, YOUR HONOR.

THE COURT: I THINK WE'LL LEAVE IT THERE.

WE OBVIOUSLY HAVE THE MOTION TO PHASE TRIAL. I'M HAPPY TO TAKE THAT ISSUE UP ON THE PAPERS. I THINK THAT'S, FRANKLY, JUST A TRIAL MANAGEMENT ISSUE FOR ME TO RESOLVE.

WE HAVE A TRIAL DATE ON FEBRUARY 9TH, WHICH IS LESS THAN A MONTH AWAY. I APPRECIATE THAT YOU HAVE GREAT INTEREST IN MY RULINGS ON THESE MOTIONS, SO I WILL WORK DILIGENTLY TO GET YOU THOSE RULINGS AS QUICKLY AS WE CAN, AND OBVIOUSLY DEPENDING ON HOW THIS SHAKES OUT, THE NEXT SEVERAL WEEKS MAY CHANGE ONE WAY OR ANOTHER. BUT I WILL DO MY WORK.

THANK YOU FOR YOUR ARGUMENTS TODAY.

MR. LAMBERSON: YOUR HONOR, COULD WE ASK JUST ONE QUESTION VERY BRIEFLY TO HELP US WITH OUR FILINGS NEXT WEEK?

THE COURT: YES.

MR. LAMBERSON: TRIAL BRIEFS, YOUR HONOR.

THE COURT: YES.

MR. LAMBERSON: YOUR ORDER CALLS FOR THEM. I JUST

WANT TO MAKE SURE THAT WE'RE -- WE'VE GIVEN YOUR HONOR A LOT OF PAPERS. I DON'T WANT TO GIVE YOU MORE OR LESS THAN YOU NEED.

CAN YOU GIVE US SOME GUIDANCE? I MEAN, WE'RE HAPPY TO FORGO THEM IF THAT ALLEVIATES ANYTHING, BUT WE CAN SEEK YOUR GUIDANCE.

THE COURT: I APPRECIATE SOMEBODY ASKING ME. I PUT THAT IN MY STANDING ORDER ON MY SECOND OR THIRD DAY ON THE BENCH AND IT'S BEEN THERE EVER SINCE.

(LAUGHTER.)

THE COURT: I HAVE TO CONFESS, I DON'T KNOW IF I'VE EVER CONSULTED MY TRIAL BRIEF ONCE IN ANY ACTUAL TRIAL. SO IF YOU'RE WILLING TO FORGO THEM, I'M WILLING TO FORGO THEM.

MR. TRIBBLE: DONE.

MR. LAMBERSON: ABSOLUTELY.

THE COURT: THERE'S A FEW HUNDRED GRAND RIGHT THERE.

ALL RIGHT. ANYTHING ELSE I CAN HELP YOU WITH?

MR. LAMBERSON: OH, WHILE WE'RE RAISING THESE ISSUES, WE HAD ASKED -- IN SOME DISTRICTS, THEY'LL ALLOW THE PARTIES TO SUBMIT A QUESTIONNAIRE WITH A SELF-STAMPED RETURN ENVELOPE --

THE COURT: YES.

MR. LAMBERSON: -- THAT'LL BE MAILED OUT TO THE JURY POOL, AND THAT JUST HELPS STREAMLINE THE JURY SELECTION PROCESS.

WE'D ASKED ABOUT IT. THIS DISTRICT, I DON'T THINK, DOES IT AS MUCH.

THE COURT: WE DON'T, AND AT LEAST IN A CURRENT -- OR IN A PRIOR REGIME, THE CHIEF JUDGE HAS DISCOURAGED ME FROM DOING THAT FOR VARIOUS INTERNAL ACCOUNTING REASONS, SO I WON'T BORE YOU WITH THE GOVERNMENT ACCOUNTING EXPLANATION.

I'D PREFER NOT TO DO IT. I'M PRETTY CONFIDENT WE CAN GET A GOOD JURY HERE WITHOUT ONE.

MR. LAMBERSON: THANK YOU, YOUR HONOR.

THE COURT: ANYTHING ELSE? ANY LOGISTICS QUESTIONS AT ALL I CAN HELP YOU WITH?

MR. TRIBBLE: WELL, WE HAVE A LOT OF -- I HAVE A LOT OF LOGISTICS QUESTIONS, YOU KNOW, I MEAN ABOUT JURY SELECTION AND THINGS LIKE THAT. I THINK I KNOW THE ANSWERS.

YOU KNOW, WHAT I'D RATHER DO IS GET ON THE PHONE WITH MR. LAMBERSON AND, YOU KNOW, CALL THE CLERK OR A LAW CLERK OR SOMEBODY LIKE THAT JUST TO VERIFY A FEW THINGS.

THE COURT: TELL ME WHAT. I WANT YOU TO HAVE THAT INFORMATION AND YOU DESERVE IT SOONER RATHER THAN LATER.

CAN I SUGGEST, IF YOU HAVE THAT MEET AND CONFER, MAYBE WE COULD EVEN JUST HAVE A VERY SHORT STATUS CONFERENCE WITH THE COURT. WE CAN DO IT NEXT WEEK IF THAT WORKS FOR YOU.

MR. LAMBERSON: WELL, WE ALSO DO HAVE -- THE PRETRIAL IS A WEEK BEFORE THE JURY SELECTION, BUT --

THE COURT: I APPRECIATE THAT. I THOUGHT MAYBE YOU MIGHT WANT SOME INSIGHT BEFORE THE FINAL PRETRIAL.

MR. TRIBBLE: I'D LIKE A LITTLE MORE TIME.

THE COURT: LET'S PICK A DATE AND TIME NOW. WE CAN PUT IT ON MY CALENDAR.

MR. TRIBBLE: THAT'S FINE.

THE COURT: WE'VE GOT MR. RIVERA IN THE COCKPIT.

SO, MR. RIVERA, IS THERE A TIME FOR, I MEAN, A 30 TO 60 MINUTE PHONE CALL WITH THESE PARTIES SOMETIME NEXT WEEK AFTER TUESDAY?

YOU'RE ALL WELCOME TO PARTICIPATE, BUT I ONLY NEED ONE LAWYER FROM EACH SIDE.

THE CLERK: YOUR HONOR, FRIDAY, JANUARY 23RD AT 10:00 A.M. IS AVAILABLE.

THE COURT: WHY DON'T WE GO AHEAD AND PUT THAT ON THE CALENDAR?

WILL THAT WORK FOR YOU?

MR. TRIBBLE: WHAT TIME? THAT'S FINE.

THE COURT: 10:00 A.M.

MR. TRIBBLE: THAT'S PERFECT.

THE COURT: SO LET'S PLAN TO GET TOGETHER THEN, AND IF YOU COULD DO ME THE FAVOR OF SENDING ME A SHORT LETTER WITH YOUR QUESTIONS OR ISSUES, I'LL BE PREPARED.

MR. TRIBBLE: WE'LL DO THAT, YOUR HONOR.

THE COURT: ALL RIGHT. THANK YOU.

MR. TRIBBLE: THANK YOU, YOUR HONOR.

MR. LAMBERSON: THANK YOU, YOUR HONOR.

(THE PROCEEDINGS WERE CONCLUDED AT 6:27 P.M.)

CERTIFICATE OF REPORTER

I, THE UNDERSIGNED OFFICIAL COURT REPORTER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, 280 SOUTH FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY CERTIFY:

THAT THE FOREGOING TRANSCRIPT, CERTIFICATE INCLUSIVE, IS A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

Lee-Anne Shortridge

LEE-ANNE SHORTRIDGE, CSR, CRR
CERTIFICATE NUMBER 9595

DATED: JANUARY 29, 2015